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Supreme Court of the United States

OCTOBER TERM, 1936

No 459 · No. 460

CHARLES VAN BEECK, ADMINISTRATOR, ETC.,
PETITIONER,

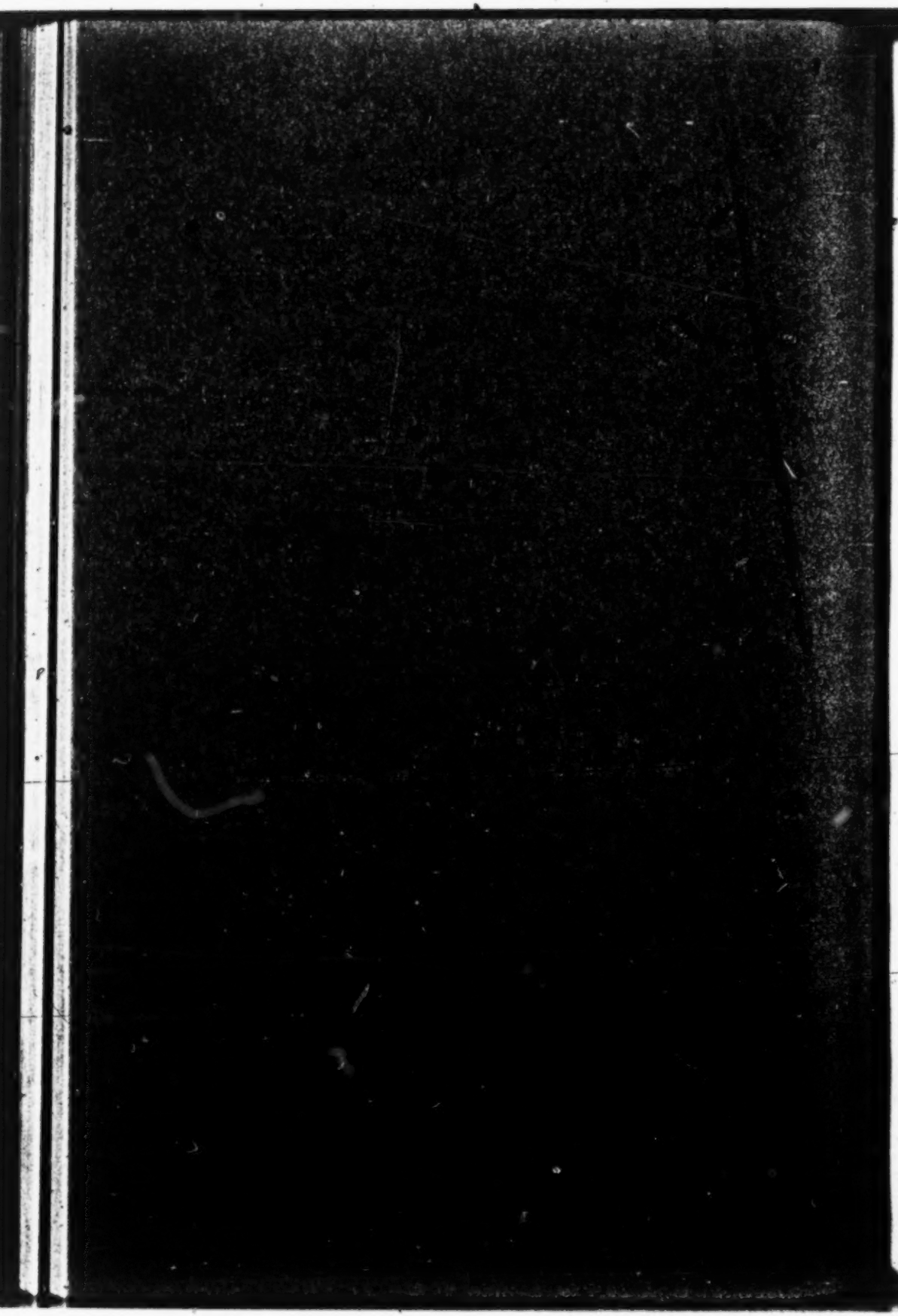
vs.

SABINE TOWING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 12, 1936.

CERTIORARI GRANTED NOVEMBER 16, 1936.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 460

CHARLES VAN BEECK, ADMINISTRATOR, ETC., PETITIONER,

vs.

SABINE TOWING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS

PETITION—LIBEL OF THE SABINE TOWING CO., INC.—Filed June 27, 1930

To the United States District Court, Eastern District of Texas, Beaumont Division:

The petition-libel of the Sabine Towing Company, Inc., owner of the recently lost ocean steam towboat "Edgar F. Coney", in a cause of exoneration from or limitation of liability, civil and maritime, alleges as follows:

First. That petitioner is a corporation created, organized and existing under the laws of the State of Texas, with its domicile and principal place of business in Port Arthur, in said state.

Second. That at and during all of the times on the voyage hereinafter particularly mentioned as well as prior and subsequent thereto, petitioner was the sole owner of the steam ocean towboat "Edgar F. Coney," of 153 gross tons, of the following approximate dimensions, to-wit: length over all 112 feet 3½ inches; breadth 20 feet 9 inches, depth from main deck at sides to top of keel 11 feet 6 inches. She was equipped with wireless with a competent operator on board. From the time of the construction of said towboat down to the time of her loss she was authorized to engage in and she was employed variously in towing services on inland, coastwise and ocean waters.

Third. That during the morning of January 27, 1930, the said steam towboat "Edgar F. Coney", then being tight, staunch, strong, properly manned, tackled, appareled and equipped, commenced a voyage bound from Smith's Bluff on Port Arthur Canal, Texas, with the bulk oil laden barge "Pure Detonox" in tow, to Pensacola, Florida, to there deliver her cargo, to proceed thence to Mobile to take on [fol. 3] another oil cargo for Tampa, Florida, and thence to return to Port Arthur, Texas. Said towboat, at the com-

mencement of said voyage was in a seaworthy condition, and was under the command of an experienced duly qualified master and other competent officers, with a full double crew in the service of said vessel, consisting, all told, of fourteen men; all of them competent for the services required of them on said vessel in their respective stations. A crew list of said tug is hereto attached and is hereby made a part hereof as if in detail set out herein, and for the purpose of identification herewith is marked "Petitioner's Exhibit A". During the afternoon said towboat anchored the barge in Sabine Pass, and on the next morning at about 7:05 o'clock the tug was again made fast alongside and continued on her voyage in this shape, and later on proceeded on a towline, in the usual customary manner.

Fourth. That at the time of the commencement of the aforesaid voyage the weather was such to indicate safe conditions as and where the said voyage was entered upon. There were then no present indications or advices that a dangerous condition of the weather and seas would be encountered during the said voyage. In due time said towboat and barge arrived out on the Gulf and all went well until in the afternoon of said day when the weather began to freshen and the sea to become unsettled. In time the barometer commenced to fall and the sea became rough, until, finally, both the towboat and barge were washed from stem to stern by the very heavy seas which were then running, with a heavy electrical and wind storm prevailing. Nevertheless, the Master, officers and crew of said towboat continued their towing of said barge, which was a seagoing whale-back bulk oil barge, until, finally, at about ten o'clock that night the lights on the towboat disappeared, and a little while later cries for help were heard on the said barge, from [fol. 4] the open waters off the barge, and everything possible to be done was done by those on the barge to render aid. The sea was running so high, with a heavy storm on, it was physically impossible to launch the lifeboat from the barge. The barge was brought to anchor and on the next morning only the upper part of the towboat's masts were standing above the water and no sign of life about. The towboat sunk in about forty-two feet of water. Petitioner made every reasonable search for men of the crew of said towboat without avail. Marine divers were employed and

taken to said wreck to examine it and secure whatever bodies, if any, could be found therein, and after making diving operations they reported they had not discovered any bodies in or about said sunken towboat. It is reported that five bodies were picked up at sea, and one on the beach, all with life-preservers on, from the said towboat; but nothing has been reported about the eight others, and petitioner has no further knowledge respecting anyone of them, whatever may have become of them.

Fifth. That whatever loss of life occurred among those who were of the officers and crew of said towboat, and whatever damage to property was occasioned, such loss of life and damage to property was done and incurred without fault on the part of petitioner; nor is petitioner a party or privy to whatever occurrence occasioned the loss of said vessel, nor did petitioner then or now or at any time have knowledge of the cause thereof, and petitioner avers upon the best of its knowledge, information and belief of its officers, that the loss of said towboat was occasioned by a peril of the sea.

Sixth. That proceedings have already been brought against petitioner for damages alleged to have been sustained by reason of the loss of the steam towboat "Edgar F. Coney", and alleged loss of life growing out of the loss of said towboat and other claims are threatened. The following suits have been brought against petitioner to re-[fol. 5] cover damages from petitioners on account alleged loss of life of certain members of the crew of said vessel, to-wit:

Ruth Anderson, administratrix of the estate of H. A. Anderson against Sabine Towing Company, filed May 31, 1930, No. 34,868, on the docket of the District Court of Jefferson County, 58th Judicial District of Texas, claiming	$30,000.00
Mrs. Ora Kenny, administratrix of the estate of John Hayden Kenny, her husband, against Sabine Towing Company, filed June 4, 1930, No. 34,890, on the docket of the District Court of Jefferson County, 58th Judicial District of Texas, claiming	70,000.00

R. J. Causey and wife, Mrs. Myrtle Causey, for the alleged death of their son Stewart Causey, against Sabine Towing Company, filed June 6, 1930, No. 34,908, on the docket of the District Court of Jefferson County, 58th Judicial District of Texas, claiming 40,000.00

Mrs. Adolphine Durio, administratrix of the estate of her husband, Cyrus Durio, against Sabine Towing Company, filed June 4, 1930, No. 34,888, on the docket of the District Court of Jefferson County, 58th Judicial District of Texas, claiming $30,000.00

Mrs. Bertha M. Pyle, administratrix of the estate of her husband, Orbilleg Pyle, against Sabine Towing Company, filed June 4, 1930, No. 34,891, on the docket of the District Court of Jefferson County, 60th Judicial District of Texas, claiming 30,000.00

[fol. 6] Mrs. Sophia Brennan, administratrix of the estate of her husband, William Brennan, against Sabine Towing Company, filed June 4, 1930, No. 34,889, on the docket of the District Court of Jefferson County, 60th Judicial District of Texas, claiming 40,000.00

All of the above named litigants in said suits are represented by Messrs. Howth, Adams and Hart, as their attorneys in said suits.

Seventh. That the loss and damages claimed against the petitioner-libelant by persons because of the sinking and loss of said towboat, greatly exceed the amount or value of the interest of the petitioner as owner of said tug, machinery, etc., after said loss, including towage possibly earned by said towboat. Upon and after the happening of said loss said towboat, her machinery, tackle, apparel, etc., became a wreck and total loss, and petitioner is informed and believes was then practically worthless, and the petitioner's interest therein became and was of little or no value. The towboat "Edgar F. Coney" stood to earn Three Hundred Ten Dollars ($310.00) per day in full for her services upon completing the voyages undertaken, and was employed in this service during a period of less than two days, so that

the amount of her earning for her services would not be in excess of Six Hundred Twenty Dollars ($620.00).

Eighth. That petitioner claims full and complete exoneration of and exemption from liability as owner of the steam towboat "Edgar F. Coney" for the losses, damages, injuries and destruction occasioned or incurred by or arising out of the sinking and loss of the said towboat, because of [fol. 7] the facts aforesaid in respect to the claims for damages and petitioner pleads said facts as a valid defense thereto. While petitioner does not admit in any way that it is under any liab-l-ty for the losses and damages occurring as aforesaid, and desires to contest said alleged liability, it claims the benefit of the limitation of liability provided for in the various acts of congress, and particularly provided for in sections 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States, as well, also, of the various acts amendatory thereof and those supplemental thereto, and in the alternative in the present proceedings, your petitioner further desires by reason of the facts hereinbefore set out, to limit its liab-lity, if any there be found, for any and all loss, destruction, damage or injury or other claim alleged to be caused by or resulting from the said loss of said towboat and to that end petitioner elects to surrender its interest in and to the wrecked towboat "Edgar F. Coney", its tackle, apparel, etc., as and where it lies, to a trustee, to be appointed by the Court, and submits herewith a stipulation with surety for the payment into Court of the sum of Six Hundred Twenty Dollars ($620.00), which represents the maximum amount of towage earning of the said towboat.

Ninth. All and singular the premises are true and correct and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioner prays that this Honorable Court will be pleased to appoint a trustee to whom the rights, title and interest of petitioner in and to whatever remains of the towboat "Edgar F. Coney", her tackle, apparel, equipment, etc., as and where it lies in the Gulf of Mexico, may be made; and that security for her towage earnings [fol. 8] pending, if any there be, covering her two days' services at Three Hundred Ten Dollars ($310.00) per day;

wherein a condition of said bond shall be that said money shall be paid unto the Clerk of Court as and when the Court shall order in event the Court shall determine that this money is subject to payment into the registry of the Court; that the Court will also appoint a commissioner to receive proof of claims in respect of the premises, in accordance with the rules and practice of this Court; that it will also issue its monition to all persons whomsoever claiming damages by reason of the aforesaid loss of the said towboat "Edgar F. Coney", citing them to be and appear before the said Commissioner at or before a time to be fixed in said writ, and make due proof, if they can, of their respective claim; and also commanding them to appear and to answer under oath all and singular the allegations of this petition; that this Court will issue its restraining order or preliminary injunction restraining the further prosecution of the above mentioned suits set out in the sixth article of this petition, with service thereof on Messrs. Howth, Adams & Hart, as the respective attorneys of record for plaintiffs in said suits, and further restraining the commencement hereafter of any suit, action or legal proceeding of any nature or description whatsoever against this petitioner by reason of the disaster, losses, damages, etc., hereinbefore mentioned; that the Court will upon due consideration pronounce for this petitioner and adjudge that it is not liable for any claims or demands arising out of the loss aforesaid of the said *two*boat "Edgar F. Coney" or, in the alternative, if any liability ever existed in favor of any one or more persons to any extent that it be discharged therefrom by reason of the surrender to the trustee as aforesaid of all of petitioner's rights, title and interests in and to the said towboat as aforesaid; and upon payment into Court, if the Court shall so direct, of the aforesaid Six Hundred Twenty Dollars ($620.00), representing the towage service [fols. 9-33] aforesaid; and that this petitioner may have such other, further or different relief in respect to the premises as in law and justice petitioner may be entitled to receive and the Court competent to grant.

Sabine Towing Company, Inc., (Org. Sgd.) by M. T. Ball, President. (Org. Sgd.) John D., M. A. & Edwin H. Grace, Proctors for Petitioner.

Duly sworn to by Munger T. Ball. Jurat omitted in printing.

[fol. 34] IN UNITED STATES DISTRICT COURT

AMENDED CLAIM AND ANSWER OF SOPHIA BRENNAN ET ALS.—
Filed February 24, 1931

Come now Mrs. Sophia Brennan, suing herein as administratrix of the estate of William Brennan, deceased, and acting on behalf of herself and her minor children, Audrey Brennan, William Brennan, Jr., and Gloria Jean Brennan, and also Mrs. Bertha M. Pyle, administratrix of the estate of Arville Glen Pyle, deceased, acting for herself, and also Mrs. Adolphine Durio, administratrix of the estate of Cyrus Durio, deceased, acting for and — behalf of herself and her minor children, Bertha Durio, Mildred Durio, Erline Durio and Joseph Durio, and also R. J. Causey, administrator of the estate of Stewart Causey, deceased, acting for and on behalf of himself and his wife, Mrs. Myrtis Causey, and also Ora Kenney, Administratrix of the estate of Joseph Hayden Kenney, deceased, acting on behalf of herself and her minor children, Joseph Hayden Kenney, Jr., and Kathleen Kenney, and also W. M. Crook, administrator of the estate of C. L. Nelson, deceased, acting on behalf of Ruth Nelson, widow of C. L. Nelson, and also Ruth Anderson, administratrix of the estate of H. A. Anderson, deceased, suing on behalf of herself, and also Mrs. Jennie Royackers, suing herein as administratrix of the estate of Edward C. Van Beeck deceased, with leave of the Court first obtained, file this their first amended answer and claim, in a cause of action, civil and maritime, instituted by the Sabine Towing Company, and for such answer and claim said claimants allege and propound as follows:

1

They admit the matters and things set up in Paragraph one of the petition of Sabine Towing Company, incorporated, herein.

[fol. 35]

2

They admit the ownership of the tug boat "Edgar F. Coney" and admit that she was equipped with some character of wireless, but affirmatively state that said wireless was not in proper working order and deny the competency of the operator on board. They also admit that said tow

boat had been engaged from the time of her construction to the time of her loss in various towing service, but deny her seaworthiness and fitness for the service in which she was engaged at the time of her loss.

3

They admit that the "Edgar F. Coney" commenced on a voyage from Smiths Bluff in the Port Arthur canal on the 27th day of January, 1930, but deny that she was then tight, strong, properly manned, tackled and appareled for the voyage and deny that she was in a seaworthy condition and deny on information and belief the qualifications of the crew as alleged.

4

These claimants deny that the weather was such as to indicate a safe voyage when the trip was commenced but aver on the contrary that the indications were such that extreme care should have been exercised with respect to the seaworthiness and condition of the barge and tug. They have not sufficient information about the conditions on the voyage to make a categorical denial and, therefore, deny the things alleged in paragraph four occurring on the voyage on information and belief. They admit the employment of divers and admit that none of the crew of the "Edgar F. Coney" survived, and allege on information and belief that so far as is known all of the members of said crew are now dead.

[fol. 36]

5

They deny that the loss of the lives of the crew was without the fault on the part of the petitioner, and deny that the same occurred without the privity and knowledge of the petitioner, its officers and duly authorized agents, and deny that the loss of said tow boat was occasioned by a peril of the sea but aver that it was occasioned through the negligence of the petitioner and with the privity of its officers.

6

They admit the matters and things set forth in paragraph six of the petition.

7

They admit that the damages claimed on account of the loss of said tow boat greatly exceed the value of said tow boat and its freight and admit that said tow boat is a total loss.

8

The claimants deny that petitioner is entitled to full and complete exoneration and exemption from liability as claimed and deny that it is entitled to the benefit of liability as claimed, and deny that the petitioner is ent-tled to surrender its interest in the "Edgar F. Coney" by the payment of $620.00 and on the contrary allege that this petition should be dismissed for the reason that the "Edgar F. Coney" was engaged in the towage of the barge "Pure Detenox" which said barge and tow boat were constituted one instrument in navigation, each one of said vessels having its part to play in the navigation of the flotilla and each being responsible to the other for correct navigation and [fol. 37] these claimants aver that the "Edgar F. Coney" would not have sunk had it not been for the weight dragging her over in the water and they, therefore, aver and allege that before any petition for limitation of liability should be considered at all or heard that said petitioner be required to surrender the value of the barge "Pure Detenox" as it existed at the end of the voyage, together with the freight, and in making these allegations the claimants desire to make it clear that they deny that petitioner is entitled to limitation in any event, even with the surrender of the entire flotilla because they say that said loss and damage was occasioned through the negligence and the fault of the petitioner and with the privity and knowledge of its duly authorized agents.

9

Claimants deny all and singular the premises are true but admit the jurisdiction of this Court provided the Court finds that it has any right to proceed with the limitation at all.

Wherefore, claimants having made full answer to the petition and libel of the Sabine Towing Company, here and

now file their claims in this cause and for such claims allege and propound as follows:

10

That William Brennan was the husband of Mrs. Sophia Brennan and the father of Audrey Brennan, William Brennan, Jr., and Gloria Jean Brennan; that Orville Glen Pyle was the husband of Mrs. Bertha M. Pyle; that Cyrus Durio was the husband of Mrs. Adolphine Durio and the father of Bertha Durio, Mildred Durio, Erline Durio and Joseph Durio; that Joseph Hayden Kenney was the husband of [fol. 38] Mrs. Ora Kenney and the father of Joseph Hayden Kenney, Jr., and Kathleen Kenney; that Stewart Causey was the son of R. J. Causey and Mrs. Myrtis Causey; that C. L. Nelson was the husband of Mrs. Ruth Nelson; that H. A. Anderson was the husband of Mrs. Ruth Anderson; that Edward C. Van Beeck was the son of Mrs. Jennie Royackers (whose name was formerly Jennie Van Beeck, her husband and the father of the deceased being dead, and she thereafter having married * * * Royackers).

11

The claimants allege that prior to the 27th day of January, 1930, the petitioner herein was desirous of moving the barge "Pure Detenox" loaded with a cargo to Pensacola, Florida, and for this purpose used its towboat "Edgar F. Coney" to tow said barge and for the purpose of said voyage the petitioner employed William Brennan as Master, Joseph Hayden Kenney as first mate, Orville Glen Pyle as Chief Engineer, Cyrus Durio as Steward, Stewart Causey as sailor, H. A. Anderson as fireman, C. L. Nelson as fireman, and Edward C. Van Beeck as second mate.

12

That while on said voyage to Pensacola and while aboard said tug "Edgar F. Coney", Captain William Brennan, Joseph Hayden Kenney, Orville Glen Pyle, Cyrus Durio, Stewart Causey, H. A. Anderson, C. L. Nelson and Edward C. Van Beeck were drowned on the high seas of the Gulf of Mexico through the negligence of the petitioner, the Sabine Towing Company, its officers and agents, which said negligence was the proximate cause of the drowning and death of the parties herein named.

[fol. 39] 13

That the negligence of the petitioner which proximately caused the death of the parties herein named was as follows:

(a) That the vessel was not properly manned.

(b) That said vessel was unseaworthy in that same was top heavy and thereby dangerous to the lives of the crew and not proper to be sent to sea in the condition it was when sent out by petitioner.

(c) That the petitioner had changed the stability and buoyancy of said vessel, by repairs and additions which it had made and placed on said vessel after purchase thereof by petitioner.

(d) That the petitioner failed to use due diligence with respect to inspection of said vessel prior to its being sent to sea on the trip during which it was lost.

(e) That the petitioner was at fault in allowing and ordering said flotilla to proceed to sea on its last trip in view of the weather conditions, both those then and there existing and those likely to occur, and of all of which said said weather conditions petitioner had both actual and constructive notice and knowledge, and was particularly at fault and guilty of negligence in view of the unseaworthy condition of the tug in charge of said flotilla.

14

That William Brennan was thirty-seven (37) years of age and at the time of his death was earning the sum of $200.00 per month exclusive of room and board and was contributing and would have contributed most of his earn-
[fol. 40] ings to his wife and children for many years to come; that Cyrus Durio was fifty-two (52) years of age and at the time of his death was earning the sum of $100.00 per month, exclusive of room and board and was contributing and would have contributed most of his earnings to his wife and children for many years to come; that Orville Glen Pyle was thirty-four (34) years of age, and at the time of his death was earning the sum of $190.00 per month, exclusive of room and board, and was contributing and would have contributed most of his earnings

to his wife; that Joseph Hayden Kenney was thirty-four (34) years of age, and at the time of his death was earning the sum of $165.00 per month, exclusive of room and board, and was contributing and would have contributed most of his earnings to his wife and children; that Stewart Causey was a young and robust *young* man and at the time of his death was earning the sum of $100.00 per month, exclusive of room and board, and was contributing and would have contributed most of his earnings to his mother and father; that C. L. Nelson was a young and robust man and at the time of his death was earning the sum of $150.00, exclusive of room and board and was contributing and would have contributed most of his earnings to his wife; that H. A. Anderson was a young and robust man and at the time of his death was earning the sum of $150.00 exclusive of room and board and was contributing and would have contributed most of his earnings to his wife; that Edward C. Van Beeck was at the time of his death 33 years of age, unmarried, and a strong, robust, healthy man, and was earning the sum of approximately $165.00 per month, exclusive of room and board, and was contributing and would have contributed to the support of claimant, his mother, a large part of his earnings, and was at said time actually contributing and had long prior thereto been contributing to her support the sum of approximately Sixty Dollars ($60.00) per month, as his mother was wholly dependent upon him for support and maintenance; that [fol. 41] every and all of the above mentioned claimants were dependent upon their respective decedents for support and maintenance, and as a direct and proximate result of the negligence of the petitioner, as aforesaid, have sustained actual damages in the total sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

15

All and singular the premises are true.

Wherefore, the claimants here and now file their claims and pray that the petition for limitation of liability of the petitioner, the Sabine Towing Company, be denied and that these claimants have judgment for the full amount of their damages as hereinabove alleged, and in the event that it should be held that the petitioner has a right to limitation of liability, then that such limitation be conditioned

upon the filing of a bond for the value of the barge "Pure Detenox" and her freight earned and pending, and that they be awarded their proportionate shares of the property now within the jurisdiction of the Court or that may be hereafter required to be brought within the jurisdiction of this Court to satisfy the claims arising out of the loss and destruction of the tug "Edgar F. Coney" as hereinabove described, and for such other and further relief as in law and justice they may be entitled to receive.

Howth, Adams & Hart, by M. G. Adams, 305 Goodhue Building, Beaumont, Texas. Lockhart, Hughes & Lockhart, Locktay Building, Galveston, Texas. Crook, Lefler, Cunningham & Murphy, Proctors for Claimants, American Natl. Bank Building, Beaumont, Texas.

[fols. 42-45] *Duly sworn to by M. G. Adams. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

INTERLOCUTORY DECREE ON QUESTION OF LIABILITY, ETC.—Filed July 13, 1933

Petition having been filed herein on the 17th day of June, 1930, by the Sabine Towing Company, Inc., under the provisions of Sections 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States and of the various acts amendatory thereof and those supplemental thereto, for the limitation of its liability for the loss of life, destruction, damage and injury occasioned by or resulting from the sinking of the steam tug Edgar F. Coney, on January 27, 1930; and,

The said petitioner claiming, and it being a fact, that the said tug Coney was a wreck and total loss, and having conveyed the said vessel in its condition after the sinking to a trustee duly appointed herein; and further alleging that the tow boat Edgar F. Coney stood to earn $310.00 per day in full for her services upon completing the voyage undertaken and was employed in the service during the period of less than two days, so that the amount of earning for

the services would not be in excess of $620.00; and having submitted a stipulation with surety for the payment into Court of the said sum of $620.00 as representing the maxi-
[fol. 47] mum amount of towage earning of the said tow boat; and,

Petitioner not having surrendered the barge Pure Detenox, which was being towed at the time by the said tug Coney and not having surrendered or offered to surrender at the time of the filing of the petition herein, either the said barge Pure Detenox or its value; and,

This Court having heretofore, to-wit, on or about the 28th day of June, 1930, issued a monition against all persons claiming damages for any loss, destruction, damage or injury or loss of life occasioned by the said sinking of the Coney requiring such persons to appear before this Court and make due proof of their respective claims before J. B. Morris, Esquire, the Commissioner appointed by the Court, at his office in Beaumont, Jefferson County, Texas, on or before the 6th day of May, 1930; and

Public notice of said monition having been duly given, as required by law and the practice of this Court, and the said Commissioner having duly made and filed his report bearing date the 20th day of July, 1931, wherein and whereby it appears that certain claims there enumerated and no others have been presented pursuant to said monition; and,

The matter having come on to be heard by the Court upon the said petition for limitation of liability and the answers thereto of Mrs. Sophia Brennan, suing herein, as administratrix of the estate of William Brennan, deceased, and acting on behalf of herself and her minor children, Audrey Brennan, William Brennan, Jr., and Gloria Jean Brennan, and also Mrs. Bertha M. Pyle administratrix of the estate of Orville Glen Pyle, deceased, acting for herself, and also
[fol. 48] Mrs. Adolphine Durio, administratrix of the estate of Cyrus Durio, deceased, acting for and on behalf of herself and her minor children, Bertha Durio, Mildred Durio, Erline Durio and Joseph Durio, and also R. J. Causey, administrator of the estate of Stewart Causey, deceased, acting for and on behalf of himself and his wife, Mrs. Myrtis Causey, and also Ora Kenney, administratrix of the estate of Joseph Hayden Kenney, deceased, acting on behalf of herself and her minor children, Joseph Hayden Kenney, Jr., and Kathleen Kenney, and also W. M. Cook, adminis-

trator of the estate of C. L. Nelson, deceased, acting on behalf of Ruth Nelson, widow of C. L. Nelson, and also Ruth Anderson, administratrix of the estate of H. A. Anderson, deceased, suing on behalf of herself and also Mrs. Jennie Royackers, suing herein as administratrix of the estate of Edward C. Van Beeck, deceased, and the said cause having been argued and submitted by Messrs. John D., M. A. & Edwin H. -race, proctors for the Sabine Towing Company, Inc., and by Howth, Adams & Hart, Crook, Lefler, & Cunningham and Lockhart, Hughes & Lockhart, proctors for every and all of the above named claimants, and due deliberation having been had,

Now, on motion of the said proctors for the claimants, it is

Ordered, Adjudged and Decreed that the said petitioner, Sabine Towing Company, Inc., is not entitled to exemption from any liability whatsoever as claimed by it in its petition and its prayer for exoneration from or limitation of liability for the sinking of the tug Coney and the resulting loss of life and damages be and the same is hereby in all things denied.

It is further Ordered Adjudged and Decreed that the said claimants, Mrs. Sophia Brennan, suing herein as administratrix of the estate of William Brennan, deceased, and acting on behalf of herself and her minor children, Audrey [fol. 49] Brennan, William Brennan, Jr., and Gloria Jean Brennan, and also Mrs. Bertha M. Pyle, administratrix of the estate of Orville Glenn Pyle, deceased, acting for herself, and also Mrs. Adolphine Durio, administratrix of the estate of Cyrus Durio, deceased, acting for and on behalf of herself and her minor children, Bertha Durio, Mildred Durio, Erline Durio and Joseph Durio, and also R. J. Causey, administrator of the estate of Stewart Causey, deceased, acting for and on behalf of himself and his wife, Mrs. Myrtis Causey, and also Ora Kenney, administratrix of the estate of Joseph Hayden Kenney, deceased, acting on behalf of herself and her minor children, Joseph Hayden Kenney, Jr., and Kathleen Kenney, and also W. M. Crook, administrator of the estate of C. L. Nelson, deceased, acting on behalf of Ruth Nelson, widow of C. L. Nelson, and also Ruth Anderson, administratrix of the estate of H. A. Anderson, deceased, suing on behalf of herself, and also Mrs. Jennie Royackers, suing herein as administratrix of the

estate of Edward C. Van Beeck, deceased, be and they are hereby adjudged entitled to recover of and from the said petitioner, Sabine Towing Company, Inc., all damages that have accrued to them respectively by reason of the sinking of the said tug Coney, and they said claimants above named are hereby authorized and directed to make proof before the commissioner appointed herein.

It is Further Ordered that the appointment heretofore made in this cause of J. B. Morris, Esquire, as Commissioner to hear the testimony and pass upon the amount of the damages be and the same is hereby revoked and canceled; and it is further ordered that Samuel C. Lipscomb, Esquire, be and he is hereby appointed Commissioner herein to take and hear the testimony on the amount of damages the claimants have sustained and to determine the amount thereof.

[fols. 50-163] It is Further Ordered that this cause be and is hereby referred back to the said Samuel C. Lipscomb, Esquire, duly appointed commissioner herein, to take further proofs that may be offered as to the amount of damages sustained by every and all of the claimants herein and to report thereon to this Court with the evidence taken before him with respect to the various claims for death and with his opinion in addition as respects the amount of the damages, etc., with all convenient speed; such proof to be made either orally before the said commissioner or by deposition in due course of usual and legal procedure applicable in such matters; hearings before the said commissioner to be brought on by any party in interest by notice of five days.

Randolph Bryant, United States District Judge.

[File endorsement omitted.]

[fols. 164-340] In United States District Court

Statement of Evidence Before Commissioner

* * * * * * *

Stipulation as to Certain Facts

Mr. Adams:

The stipulation is: "It is hereby stipulated that the decedent at the time of his death was unmarried and left sur-

viving him his mother, Jennie Royackers, a brother, Charles Van Beeck, age 34, and two step-brothers, Charles Royackers, age 24, and Joseph Royackers, age 36, and a step-father, Joseph Royackers. The decedent was born in Antwerp, Belgium, on March 12th, 1897. At the time of his death he was a mate on board the Edgar F. Coney and was contributing to the support of his mother at the rate of $40.00 to $50.00 per month. His mother died in July, 1931. At the time of her death she was 58.

[fol. 341] IN UNITED STATES DISTRICT COURT

REPORT OF COMMISSIONER—Filed February 28, 1935

To the Honorable Randolph Bryant, Judge:

In accordance with the interlocutory decree heretofore entered in this cause, I have heard evidence on behalf of the claimants and the petitioner as to damages sustained by the several claimants for the death of certain members of the crew of the tug "Edgar F. Coney," who lost their lives as a [fol. 342] result of the sinking of the tug in the Gulf of Mexico on January 28, 1930.

According to the report of the casualty made by M. T. Ball, President of the Sabine Towing Company, the crew consisted of fourteen men, all of whom lost their lives. The survivors of only eight of the deceased seamen offered testimony as to damages. They were, Mrs. Ora K. Kenney, widow of J. H. Kenney, Mrs. Sophia Brennen, widow of William Brennen, Mrs. C. Durio, widow of C. Durio, Mrs. Ruth Anderson, widow of H. A. Anderson, Mrs. Bertha Pyle, widow of O. G. Pyle, R. J. Causey, father of Stewart Causey, Mrs. Ruth Nelson Dumas, widow of C. L. Nelson, and Mrs. Jennie Royackers, mother of Charles Van Beeck.

The quantum of recovery is governed by Section 33 of the Merchants Marine Act (46 U. S. Code Ann. Sec. 688) which gives to the representatives of a seaman who loses his life as result of injuries sustained in the course of employment the same right of action for damages as that accorded in cases of railway employees by the Federal Employees Liability Act. The statute provides, among other things:

"And in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

Of this statute Mr. Justice Sanford says in the case of Lindgreen vs. U. S., 281 U. S. 39, 74 Law Ed. 689:

"By this act, as heretofore construed by this Court, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Federal Employees Liability Act and its amendments, and permitting these new and substantive rights to be asserted and enforced in actions in personam against employees in Federal and State [fol. 343] Courts administering common law remedies, or in suits in admiralty in Courts administering maritime remedies."

It is held that the damages are to be limited strictly to pecuniary losses, and that the loss of society or companionship is not to be taken into consideration in fixing the damages; American Railroad Co. etc., vs. Didrickson, 227 U. S. 145, 57 Law. Ed. 456; and in the Case of Michigan Railway Co. vs. Vreeland, 227 U. S. 59, 57 Law. Ed. 417, the Court, speaking through Mr. Justice Lurton, at page 422, has this to say:

"The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary * * *. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

In reference to the word "pecuniary", Judge Lurton in the same case has this to say:

"Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of the services of the husband, wife or child, and when the beneficiary is a child, for the loss of that care, counsel, training and education which it might under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation."

The clear purpose of the Act of Congress was to compensate beneficiaries as fully as money can for the loss sus-

tained. The age of the deceased, his earning capacity, his aptitude for work, his enterprise, or lack of it, the number and ages of his surviving beneficiaries and his contributions to their support and maintenance, his condition of health, his prospects for advancement, and matters of a like nature [fol. 344] are to be considered in arriving at the measure of damages sustained by the beneficiaries. There is no exact rule of law for determining compensation for pecuniary loss to the estate of the decedent. The amount should be fixed, as being now paid in a lump sum, and being freed of all the contingencies and uncertainties that inhere in human life will fairly compensate the estate for what it has been deprived of in the earnings or accumulations of the deceased had he lived out his life expectancy.

It will be noted that in the apportionment of the awards, particularly to children of certain of the claimants, there is a wide discrepancy. In fixing these awards I have considered the ages of the children and the probable financial benefit which they might have received from the deceased parent had he lived until they reached the age of majority. Some of the children being younger than others and some of the parents having earned greater or lesser sums, it is only natural that the probabilities of contributions would have been different, and these matters are taken into account in fixing the awards. Allowance is also made for the loss of counsel and training which the minor children might reasonably have expected to receive if the parent had lived, but no allowance is made for loss of society and companionship.

The claimants have introduced evidence in support of their claims based upon life expectancy and probable amounts which the deceased might have contributed to the support of the families and dependents. These calculations, made by an expert are not the sole basis of the awards. I have taken into account the earnings of the deceased seamen, their prospects for future advancement, the possibility of their being out of employment at times, and all other matters suggested by the evidence. While nearly all of the claimants testified that the expenses of the deceased ranged from ten to fifteen dollars per month, I think this approximation is [fol. 345] too low, considering that in the cases of married men their necessary expenses would more nearly approximate $25.00 per month (and in the cases of officers, standards of living would be higher, and contributions to their

family's support commensurately less), and their individual expenses would necessarily have cut down the benefits which their families might have received had they lived.

The claimants argue that, since the joint life expectancies of the deceased seamen and their beneficiaries ranged from fifteen years, as in the cases of Durio and Causey, and as high as twenty-five years, in the case of O. G. Pyle, allowance of damages on the basis of the cost of an annuity should be fixed as high as $35,000.00, depending upon the extent of the contributions made to the support of the beneficiaries. On the other hand, petitioner asserts that the greatest award should not exceed $7,500.00. I am wholly unable to agree with the contention of either the claimants or the petitioner, Testimony was introduced to the effect that at least one of the seamen was contributing as much as $185.00 per month to the support and maintenance of his family. It would be almost slanderous to say that a ship's officer, capable of earning $2,400.00 per year, would, over a period of twenty-five years contribute no more than $300.00 per year towards his family's support, either in money or money's worth. If the pecuniary loss to the family were fixed at $125.00 per month (as seems fairly reasonable in the case of a man capable of earning $200.00 per month, with several children looking to him for support), the loss to the family might justly be computed at $36,000.00, if it is supposed that the money was to be paid in annual installments. However the interest on that amount, even at 5%, would be $1,800.00 per year without any diminution of capital. The fact that one's life expectancy may be fixed at a given number of years is by no means an assurance that he will be gainfully [fol. 346] employed for that period of time. It is not the general rule that seamen will be continuously employed throughout the active periods of their lives; nor *it is* to be supposed that they will follow the sea always. Misfortunes are attendant upon every vocation. Unemployment, sickness and disability and other matters over which they have no control may interrupt, as Burns says, their best laid plans.

Other elements for consideration suggest themselves, particularly in the cases where children are involved, viz, as everyone knows, they require dental attention, correction of vision, and unremitting care in illness during their growing years. It is conceivable that the loss of a father and the

deprivation of that attention and solicitude naturally inherent in a parent would result in damage to the child, which cannot be fixed in terms of money, but which is nevertheless a pecuniary loss. (Railway vs. Vreeland, supra.) All of these matters have been given careful attention in arriving at the awards which are hereinafter made.

The decisions are replete with statements that life and annuity tables are not absolute guides for determining loss sustained by the death. It is the duty of the Commissioner, upon a review of all the evidence to award a fair and reasonable compensation, taking into consideration what the income of the deceased seaman would probably have been, how long it would have lasted, and all contingencies to which it was liable.

Reference is made to three cases commented upon by claimants and petitioner. They are The City of Rome, 48 Fed. (2d) 333, Briscoe vs. The United States, 65 Fed. (2d) 404, and Ryan Towboat Co. vs. Draper, 263 Fed. 31.

[fol. 347] In the City of Rome Judge Caffey had up for consideration the report of a Commissioner fixing awards for the loss of thirty-two lives. It appears from the report that most of the deceased seamen were young men, with high life expectancies, some of them being shown to have received pay in excess of $300.00 per month. The greatest single award fixed in that case was $35,000.00 for the death of a senior lieutenant, age thirty-two, receiving a pay of $336.00 per month. The awards to other claimants were in some instances small and in others larger, dependent upon showing of earnings, life expectancies, etc. Mitigation of damages on account of remarriage was refused upon the authority of Georgia Railroad & Banking Co. vs. Garr, 24 Am. Rep. 277, and Railway vs. Cleere (Ark.), 88 S. W. 995.

In the Briscoe case, supra, Judge Augustus N. Hand approved an award of $23,000.00 "with interest thereon from the date of the decedent's death to the date of the final decree". In that case the monthly base pay was stipulated to have been $117.00. The life expectancy was shown to have been 39.49 years. In concluding the opinion, Judge Hand has this to say:

"Likewise, the commissioner might take into account the pecuniary value of the nurture of the child and allow for its loss of intellectual, moral, and physical training. Me-

Intyre v. N. Y. Central R. R. Co., 37 N. Y. 287; Tilley v. Hudson R. R. R. Co., 24 N. Y. 471; Id., 29 N. Y. 252, 86 Am. Dec. 297; Mich. Cent. R. R. v. Vreeland, 227 U. S. at page 73, 33 S. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176. This amount, too, is indefinite and cannot be arrived at by calculation, but may none the less be properly considered. Apparently the wife is also entitled to recover funeral expenses. Murphy v. New York Central & H. R. R. Co., 88 N. Y. 445; Rebmann v. Del., L. & W. R. Co. (D. C.), 275 F. 1009; Steenberg v. Lewis, 221 App. Dig. 808, 223 N. Y. S. 444."

[fols. 348-351] The Ryan-Draper case was before the Circuit Court of Appeals at New Orleans for review of Judge Hutcheson's decision in the District Court. No reference is made to the amount of damages in the report of the case when it was affirmed by the U. S. Circuit Court of Appeals; but I have been supplied with the printed transcript of the record, from which it appears that Judge Hutcheson allowed to the widow and children of Albert J. Draper $10,000.00, upon a showing that he was thiry-five years of age and earning around $100.00 per month.

But these awards of appellate and trial Courts are no more than persuasive and each case must necessarily stand upon its own facts. Entertaining these views and giving due allowance for the arguments of both claimants and Petitioner, I have endeavored to fix a reasonable and fair award to each of the several claimants as set out below. In making allowances for the children, I have taken into consideration this one other circumstance, viz: where the income of one family was shown to be appreciably larger than that of another family, I regarded the loss to the child as distinctly larger than it would have been for a child whose parent was earning much less wages; because it is only reasonable to expect the child of a parent earning the larger income will receive more advantages in a material and educational way.

* * * * * * *

[fol. 352] 8. It was agreed by counsel that Edward Van Beeck at the time of his death was unmarried, and that he left surviving him his mother, Mrs. Jennie Royackers, and several brothers, and that at the time of his death he was

contributing to the support of his mother from $30.00 to $50.00 per month. It was further agreed that his mother died on July 31st, 1931, and that at the time of her death she was fifty-eight years of age. The pecuniary loss is limited to the duration and extent of the lifetime of the mother. (Snider vs. G. E. Co. (N. Y.), 34 A. L. R. 158). [fols. 353-359] The award in this case is fixed at $700.00.

Respectfully submitted, Samuel C. Lipscomb, Commissioner.

[File endorsement omitted.]

[fols. 360-379] In United States District Court

Claimant's Exceptions and Objections to Report of Commissioner—Filed March 4, 1935

* * * * * * *

[fol. 380] (8) Mrs. Jennie Royackers (In this case it was agreed that Mrs. Royackers, the mother, was receiving from her son a sum from $30.00 to $50.00 per month and that she died July, 1931, and if this be calculated for eighteen months at $40.00 it produces the sum of $720.00 [fols. 381-388] as against the $700.00 awarded by the commissioner.

* * * * * * *

[fol. 389] [File endorsement omitted.]

[fol. 390] In United States District Court

Suggestions of the Death of Mrs. Jennie Royackers, Administratrix, and Order of Substitution—Filed July 18, 1935

Come now the Proctors for Mrs. Jennie Royackers administratrix of the estate of Edward C. Van Beeck and suggest to the Court the death of Mrs. Jennie Royackers after her appointment as administratrix of the said estate, and show to the Court that in the place and stead of the said

Mrs. Jennie Royackers Charles Van Beeck was heretofore appointed administrator of the estate of Edward C. Van Beeck, deceased, by the County Court of Jefferson County, Texas, during the month of June, 1935, and that the said Charles Van Beeck is now the duly qualified and acting administrator of said estate and is duly authorized to prosecute this cause of action herein as fully as if originally appointed herein, and said administrator prays that the Court enter an order substituting him as such administrator with full power and authority to act herein.

Howth, Adams & Hart, Lockhart, Hughes & Lockhart, Proctors for said Claimant.

The foregoing application having been duly considered, it is ordered that Charles Van Beeck, administrator, be and he is hereby substituted herein in lieu of Mrs. Jennie Royackers, administratrix of the estate of Edward C. Van Beeck, and that he be and he is hereby invested with full powers and authority to act herein.

(Signed) Randolph Bryant, Judge.

[fols. 391-394] In United States District Court Eastern District of Texas, at Beaumont

No. 334. In Admiralty

In the Matter of the Petition of Sabine Towing Company for Limitation of Liability

Findings of Fact and Conclusions of Law—Filed July 18, 1935

Upon a careful consideration of all the facts introduced upon the question of damages before the Commissioner, Honorable Samuel C. Lipscomb, and after the full consideration of the report of the said commissioner heretofore filed herein, I overrule all exceptions to said report, and adopt the Findings of the said Commissioner, as my Findings, and herewith file the following Findings of Fact and Conclusions of Law.

Findings of Fact

* * * * * * *

[fol. 395] 8. It was agreed by counsel that Edward Van Beeck at the time of his death was unmarried, and that he

left surviving him his mother, Mrs. Jennie Royackers, and several brothers, and that at the time of his death he was contributing to the support of his mother from $30.00 to $50.00 per month. It was further agreed that his mother died on July 31, 1931, and that at the time of her death she was fifty eight years of age.

CONCLUSIONS OF LAW

I conclude as a matter of law that the personal representatives of Joseph H. Kenney, William Brennen, O. G. Pyle, H. A. Anderson, C. Durio, C. L. Nelson, Stewart Causey and Edward Van Beeck be and they are entitled to recover the damages hereinabove found with interest thereon at 6% [fol. 396] from the date of the filing of the Commissioner's report.

(Sgd.) Randolph Bryant, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 334 A. D.

In the Matter of the Petition of the SABINE TOWING COMPANY, INC., Owner of the Tug "Edgar F. Coney" Praying for Exoneration of or Limitation of Liability

FINAL DECREE—Filed July 18, 1935

Whereas, on July 13th, 1933, an interlocutory decree was filed herein, wherein it was decreed, that the claimants were entitled to recover such damages as have arisen to the beneficiaries of William Brennan, Orville Glenn Pyle, Cyrus Durio, Stewart Causey, Joseph Hyden Kenney, C. L. Nelson, H. A. Anderson, and Edward C. Van Beeck, all deceased, and

Whereas, a Commissioner, Samuel C. Lipscomb, Esq., was appointed to assess the damages arising by reason of the death of the aforementioned parties, and to report same to the Court with all convenient speed, and

Whereas, on the 28th day of February, 1935, the said Commissioner made his final report, and exceptions having

been lodged thereto by both parties, and the Court having heard the said exceptions and the arguments in support of same, is of the opinion, that the amount of damages arising [fol. 397] by reason of the negligence of the petitioner upon each claim filed is as follows:

To Mrs. Sophia Brennan, administratrix of the estate of William Brennan, $21,000.00, apportioned as follows: to Mrs. Sophia Brennan $15,000.00; to Audrey Brennan $1500.00; to William Brennan Jr., $2000.00; to Gloria Jean Brennan $2500.00.

To Mrs. Bertha M. Pyle, administratrix of the estate of Orville Glenn Pyle, $20,000.00, for the sole use and benefit of Mrs. Bertha M. Pyle.

To Mrs. Adolphine Durio, administratrix of the estate of Cyrus Durio, $9,000.00, apportioned as follows, to Adolphine Durio, $7,300.00, to Mildred Durio, $400.00, to Earline Durio $500.00, to Joseph Durio $800.00.

To R. J. Causey, administrator of the estate of Stewart Causey $3000.00, apportioned as follows: to R. J. Causey $1500.00, to Mrs. Myrtis Causey $1500.00.

To Mrs. Ora Kenney, administratrix of the estate of Joseph Hyden Kenney $20,000.00, apportioned as follows: to Mrs. Ora Kenney $15,300.00, to Joseph Hyden Kenney Jr., $2000.00, to Kathleen Kenney, $2,700.00.

To W. M. Crook, administrator of the estate of C. L. Nelson $7500.00, for the sole use and benefit of Ruth Nelson, now Ruth Nelson Dumas.

To Ruth Anderson, administratrix of the estate of H. A. Anderson, $11,000.00, for the sole use and benefit of Ruth Anderson.

To Charles Van Beeck Administrator of the estate of Edward C. Van Beeck $700.00, same being the amount of [fol. 398] damages accruing to Mrs. Jennie Royackers up to the time of her death, for the sole use and benefit of the ——, heirs at law of Mrs. Jennie Royackers, now deceased.

It is therefore Ordered, Adjudged And Decreed by the Court in pursuance to the interlocutory decree heretofore rendered that the petition of the Sabine Towing Company, Inc., for exoneration and/or limitation of liability be and the same is hereby denied, and the Claimants Sophia Brennan, administratrix of the estate of William Brennan, Bertha M. Pyle, administratrix of the estate of Orville Glenn Pyle; Mrs. Adolphine Durio, administratrix of the estate of

Cyrus Durio; R. J. Causey, administrator of the estate of Stewart Causey; Mrs. Ora Kenney, administratrix of the estate of Joseph Hyden Kenney; W. M. Crook, administrator of the estate of C. L. Nelson; Ruth Anderson, administratrix of the estate of H. A. Anderson; and Charles Van Beeck administrator of the estate of Edward C. Van Beeck, do have and recover of and from the Sabine Towing Company, a corporation, the sum of $92,200.00, to be apportioned as hereinabove set forth, to-wit;

To Sophia Brennan, administratrix, of the estate of William Brennan, $21,000.00, apportioned as follows: to Mrs. Sophia Brennan $15,000.00; to Audrey Brennan $1500.00; to William Brennan Jr. $2000.00; to Gloria Jean Brennan $2500.00.

To Mrs. Bertha Pyle, administratrix of the estate of Orville Glenn Pyle, $20,000.00; for the sole use and benefit of Mrs. Bertha M. Pyle.

To Mrs. Adolphine Durio, administratrix of the estate of Cyrus Durio, $9,000.00, apportioned as follows, to Adolphine [fol. 399] Durio, $7,300.00, to Mildred Durio, $400.00, to Earline Durio $500.00, to Joseph Durio $800.00.

To R. J. Causey, administrator of the estate of Stewart Causey $3000.00, apportioned as follows: to R. J. Causey $1500.00, to Mrs. Myrtis Causey $1500.00.

To Mrs. Ora Kenney, administratrix of the estate of Joseph Hyden Kenney $20,000.00, apportioned as follows: to Mrs. Ora Kenney $15,300.00, to Joseph Hyden Kenney Jr., $2000.00, to Kathleen Kenney, $2,700.00.

To W. M. Crook, administrator of the estate of C. L. Nelson $7500.00, for the sole use and benefit of Ruth Nelson, now Ruth Nelson Dumas.

To Ruth Anderson, administratrix of the estate of H. A. Anderson, $11,000.00, for the sole use and benefit of Ruth Anderson.

And whereas, on the 18th day of March, 1932, a bond in the sum of $140,000.00 was filed in this cause pursuant to an order in the case of Mrs. Sophia Brennan et al. vs. Sabine Transportation Company, Inc., and Sabine Towing Company, Inc., No. 476 in Equity, said bond conditioned that Sabine Towing Company, Inc. and Sabine Transportation Company, Inc., should abide by and perform any decree and pay any final judgment rendered in this Court, and on

appeal by an Appellate Court, that might be rendered against them, or either of them in this cause; said Sabine Towing Company, Inc., and Sabine Transportation Company, Inc., being principals upon said bond, and M. T. Ball, L. L. Abshire, R. P. Smith, A. S. Hansen and H. M. Fredrickson being sureties on same.

[fol. 400] It is therefore, Ordered, Adjudged And Decreed by the Court that the Claimants above named in pursuance to the terms of said bond do have and recover of and from the said Sabine Towing Company, Inc., and Sabine Transportation Company, Inc., as principals, and M. T. Ball, L. L. Abshire, R. P. Smith, A. S. Hansen and H. M. Fredrickson, as sureties, in the amount and in the proportion hereinabove set forth, and with interest as provided herein, for all of which execution may issue in the event that execution has been theretofore issued and returned unsatisfied against the Sabine Towing Company, Inc.

And whereas, in connection with the filing of the petition herein, the Sabine Towing Company, Inc., executed and filed its bond with the American Surety Company of New York as Surety thereon, in the sum of $620.00 representing the pending freight on the voyage on which the Edgar F. Coney was lost, and by reason of the judgment herein liability has accrued on said bond.

It is therefore Ordered, Adjudged And Decreed, that execution issue against the American Surety Company of New York for an amount not exceeding the sum of $620.00 in the event that execution against the Sabine Towing Company, Inc. has been returned unsatisfied.

It appearing that petitioner has agreed that the sum of $1500.00 is a proper allowance to the Commissioner, it is further ordered that Samuel C. Lipscomb be and he is hereby allowed a fee of Fifteen Hundred Dollars for his services as Commissioner herein to be taxed against the Petitioner as costs in this case; and the Commissioner shall be entitled to an attachment against Petitioner for the amount allowed as his fee if the same shall not be paid within ten days after entry hereof.

(Signed) Randolph Bryant, Judge.

[File endorsement omitted.]

[fol. 401] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 26, 1935

The petition of the Sabine Towing Company, Inc., owner of the tug, Edgar F. Coney, before and at the time of her loss in the Gulf of Mexico, herein referred to, and the Sabine Transportation Company, Inc., as Principal, and M. T. Ball, L. L. Abshire, R. P. Smith, A. S. Hansen, and H. M. Fredrickson as individual sureties on a certain bond filed herein on March 18, 1932, under order of Court, in the sum of $140,000, and the American Surety Company of New York, surety on the stipulation filed herein, in the sum of $620, representing the pending freight on said voyage:

Respectfully represents:

That they are aggrieved by the final judgment and decree herein rendered and signed on the 17th day of July 1935, awarding damages against Petitioners, and in favor of claimants, and apportioned as in said final decree provided. That there are errors therein that are to the manifest prejudice and injury of Petitioners, and that petition for the reasons specified in the Assignments of Error filed herewith which are hereby made a part hereof, and for purpose of identification herewith, are hereby marked Assignments of Errors, desire to appeal from said final judgment and decree, and desire that said appeal returnable to the United States Circuit Court of Appeals for the Fifth Circuit, shall operate as a supersedeas and may suspend during the pendency of said appeal the effect of said final decree.

Wherefore, Petitioners pray that an ppeal may be allowed upon such terms as the Court shall deem just, and [fol. 402] that said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of said final judgment and decree; that said appeal be made returnable to the Unitel States Circuit Court of Appeals, for the Fifth Circuit, according to law, and due notice of this appeal and citation be served on Mrs. Sophia Brennan, Mrs. Bertha M. Pyle, Mrs. Adolphine Durio, R. J. Causey, Ora Kenney, Ruth Anderson and Wm. M. Cook, Claimants and appellees herein, by service on their proctors of record, and that a transcript of record, proceedings, papers and exhibits filed in this cause in evidence upon which the final decree on question of damages was ren-

dered, duly authenticated, be sent to the United States Circuit Court of Appeals, and Petitioners pray for all general and equitable relief.

(Sgd.) John D., M. A. & Edwin H. Grace, Proctors for Petitioners.

ORDER ALLOWING APPEAL

Let an appeal be granted the above named Petitioners to operate as a supersedeas and to suspend the operation of said final decree during the pendency of this appeal, upon Petitioners' furnishing bond in the sum of $3,000.00, said appeal to be returnable to the United States Circuit Court of Appeals, for the Fifth Circuit, according to law, and that citation issue as herein prayed for.

(Signed) T. M. Kennerly, Judge.

Houston, Texas, July 25, 1935.

[fol. 403] ASSIGNMENT OF ERRORS TO THE FOREGOING PETITION

First

That the Court erred in affirming the Commissioners' Report and in awarding to Mrs. Sophia Brennan, administratrix of the Estate of Wm. Brennan, a total sum of $21,000, and in apportioning said sum as follows:

To Mrs. Sophia Brennan	$15,000
To Audrey Brennan	1,500
To Wm. Brennan, Jr.	2,000
To Gloria Jean Brennan	2,500

because the said amount is excessive and should have been reduced; that the Court erred in rendering judgment in favor of Mrs. Sophia Brennan as Administratrix and in apportioning said award as hereinabove set out, because the said amount is excessive, as shown by the law and the evidence.

Second

The Court erred in affirming the Commissioner's Report and in awarding to Mrs. Bertha M. Pyle, Administratrix

of the Estate of Orville Glenn Pyle, a total sum of $20,000, for the sole use and benefit of Mrs. Bertha M. Pyle, because the said amount is excessive and should have been reduced; that the Court erred in rendering judgment in favor of Mrs. Bertha M. Pyle as Administratrix in the sum of $20,000, because the said amount is excessive, as shown by the law and the evidence.

Third

The Court erred in affirming the Commissioners' Report [fol. 404] and in awarding to Mrs. Adolphine Durio, Administratrix of the Estate of Cyrus Durio, the total sum of $9,000, and in apportioning said sum as follows:

To Adolphine Durio	$7,300
To Mildred Durio	400
To Earline Durio	500
To Joseph Durio	800

because the said amount is excessive and should have been reduced. That the Court erred in rendering judgment in favor of Mrs. Adolphine Durio as Administratrix and in apportioning said award as hereinabove set out, because the said amount is excessive, as shown by the law and the evidence.

Fourth

That the Court erred in affirming the Commissioners' Report and in awarding to R. J. Causey, Administrator of the Estate of Stewart Causey, the total sum of $3,000, and in apportioning said sum as follows:

To R. J. Causey	$1,500
To Mrs. Myrtis Causey	1,500

because the said amount is excessive and should have been reduced. That the Court erred in rendering judgment in favor of R. J. Causey as Administrator and in apportioning said award as hereinabove set out, because the said amount is excessive, as shown by the law and the evidence.

Fifth

That the Court erred in affirming the Commissioners' Report and in awarding to Mrs. Ora Kenney, Administra-

[fol. 405] trix of the Estate of Joseph Hayden Kenney, a total sum of $20,000, and in apportioning said sum as follows:

To Mrs. Joseph Hayden Kenney	$15,300
To Joseph Hayden Kenney, Jr.	2,000
To Kathleen Kenney	2,700

because the said amount is excessive and should have been reduced. That the Court erred in rendering judgment in favor of Mrs. Ora Kenney as Administratrix and in apportioning said award as hereinabove set out, because the said amount is excessive, as shown by the law and the evidence.

Sixth

The Court erred in affirming the Commissioners' Report and in awarding to Wm. Crook, Administrator of the Estate of C. L. Nelson, the sum of $7500, for the sole use and benefit of Ruth Nelson, now Ruth Nelson Dumas, because the said amount is excessive and should have been reduced. That the Court erred in rendering judgment in favor of Wm. Crooks, Administrator, for the sole use and benefit of Ruth Nelson, now Ruth Nelson Dumas, because the said amount is excessive and should have been reduced. That the Court erred in rendering judgment in favor of Wm. Crooks, Administrator, for the sole use and benefit of Ruth Nelson, now Rulth Nelson Dumas, because the said amount is excessive, as shown by the law and the evidence.

Seventh

That the Court erred in affirming the Commissioners' Report and in awarding to Ruth Anderson, Administratrix of the Estate of H. A. Anderson, the sum of $11,000 for the [fols. 406-430] sole use and benefit of Ruth Anderson, because the said amount is excessive and should have been reduced. The Court erred in rendering judgment in favor of Mrs. Ruth Anderson, Administratrix, for the sole use and benefit of Auth Anderson, the sum of $11,000, because the said amount is excessive, as shown by the law and the evidence.

Eighth

The Court erred in referring to annuity tables, which were not applicable to lives of seamen, and further erred

in its determination of the average monthly earnings of decedents herein.

Ninth

That the decree of the Lower Court is contrary to the law and the evidence.

Tenth

The Court erred in allowing interest on damages from date of the Commissioners' Report.

(Sgd.) John D., M. A. & Edwin H. Grace, Proctors for Appellant.

July 25, 1935.

[File endorsement omitted.]

[fol. 431] In United States District Court, Eastern District of Texas

No. 7876

Sabine Towing Company et al., Appellants,

vs.

Sophie Brennan et al., Appellees

Petition for Cross Appeal—Filed November 4, 1935

Charles Van Beeck, Administrator of the estate of Edward C. Van Beeck, considering himself in his representative capacity as aforesaid, aggrieved by the final judgment entered in this cause on or about the 18th day of July, 1935, wherein he was denied any recovery against the Sabine Towing Company, Inc., the Sabine Transportation Company, Inc., M. T. Ball, L. L. Abshire, R. P. Smith, A. S. Hansen, H. M. Frederickson, and the American Surety Company of New York; and the said Charles Van Beeck as such administrator hereby appeals from said decision [fol. 432] to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, and files herein his cross assignment of errors as required by law, and thereupon prays that his said appeal be allowed, and that the necessary

transcript of the record upon which said final judgment was based may be sent up duly authenticated to the said United States Circuit Court of Appeals for the Fifth Circuit, and that citation in due form be issued citing the libelants to appear and answer to said cross appeal.

Charles Van Beeck, as Administrator of the Estate of Edward C. Van Beeck, by Howth, Adams & Hart, by M. G. Adams; Lockhart, Hughes & Lockhart, His Proctors.

Cross Assignment of Errors Referred to in the Foregoing Petition

Cross Assignment of Error No. 1:

The court erred in holding that as a matter of law Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, was not entitled to recover the amount of damages as found by the Commissioner or any part thereof.

Cross Assignment of Error No. 2:

The court erred in failing and refusing to confirm the findings of the Commissioner in the sum of Seven Hundred [fols. 433-442] ($700.00) Dollars, which said sum represented the pecuniary loss of Mrs. Jennie Royakers up to the time of her death, and erred in refusing to award interest on said sum from the date of the Commissioner's report.

Howth, Adams & Hart, by M. G. Adams, Lockhart, Hughes & Lockhart, Proctors for Charles Van Beeck, Administrator of the Estate of Edward C. Van Beeck.

Order Allowing Appeal

Upon the foregoing petition for cross appeal and upon reading and ordering filed the accompanying cross assignments of error, the above appeal is allowed upon the petitioner furnishing good and sufficient bond on appeal in the sum of $250.00, said appeal to be returnable to the United States Circuit Court of Appeals for the Fifth Circuit Court according to law.

Dated October 15th, 1935.

Randolph Bryant, United States District Judge.

[File endorsement omitted.]

[fols. 428-443] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 7th, 1936

No. 7876

SABINE TOWING COMPANY, INC., et al.,

versus

SOPHIA BRENNAN et al.

On this day this cause was called, and, after argument by M. A. Grace, Esq., for appellants, and H. C. Hughes, Esq., and M. G. Adams, Esq., for appellees, was submitted to the Court.

[fol. 444] ARGUMENT AND SUBMISSION

Extract from the Minutes of January 7th, 1936

No. 7977

CHARLES VAN BEECK, Administrator of the Estate of Edward C. Van Beeck,

versus

SABINE TOWING COMPANY, INC., et al.

On this day this cause was called, and, after argument by H. C. Hughes, Esq., and M. G. Adams, Esq., for cross-appellant, and M. A. Grace, Esq., for cross-appellees, was submitted to the Court.

[fol. 445] OPINION OF THE COURT—Filed August 14th, 1936

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7876

SABINE TOWING COMPANY, INC., et al., Appellants,

versus

SOPHIA BRENNAN et al., Appellees

and

No. 7977

CHARLES VAN BEECK, Administrator of the Estate of Edward C. Van Beeck, Cross-Appellant,

versus

SABINE TOWING COMPANY, INC., et al., Cross-Appellees

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Texas

(August 14, 1936)

Before Foster, Sibley and Walker, Circuit Judges

FOSTER, Circuit Judge:

These cases present an appeal and cross appeal in admiralty from a judgment awarding damages for the death [fol. 446] of certain members of the crew of the tugboat Edward F. Coney, owned by appellant, Sabine Towing Co., Inc., hereafter called the company, which vessel foundered in the Gulf of Mexico on January 28, 1930, with the loss of her entire crew of 14. The company filed a petition for limitation of liability which was denied, on the ground that the vessel was lost because unseaworthy, to the knowledge of her owners (72 F. (2d) 490). Claims were filed in that proceeding by personal representatives of eight members of the crew, hereafter called claimants, and were referred to a commissioner to take the evidence and recommend the amounts to be recovered. In due course the commissioner

reported. Exceptions to the report were filed by the company, on the ground that the awards were too high. The claimants also excepted to the report on the ground that the awards were too low. All exceptions to the commissioner's report were overruled and the amounts he recommended were adopted by the court, except as to one claim which was disallowed. Judgment was entered accordingly.

So far as he discussed it, the commissioner correctly interpreted the law. He reviewed the evidence to some extent in making his report but did not specifically find the facts as to any claim. It is not clearly shown what formula he used in determining the amounts to be awarded.

The law is well settled. The claimants are entitled to recover in admiralty, under the provisions of section 33 of the Merchant Marine Act of June 5, 1920 (T. 46 U. S. C. A. § 688), which incorporates the provisions of the Federal Employers' Liability Act (T. 45 U. S. C. A. secs. 51, et seq.) by reference. Lindgren vs. U. S., 281 U. S. 38. There may be only one recovery by the personal representative of the deceased for the benefit of all the persons entitled to damages under the act. The measure of damages is compensation for the deprivation of the reasonable expectation of [fol. 447] pecuniary benefits that would have resulted from the continued life of the deceased. In estimating this the earning power of money must be considered and an amount determined, which, capitalized at a reasonable rate of interest, would yield annually the same income the person injured might have expected from the deceased, using the interest and part of the capital from year to year. To determine this amount standard tables prepared by actuaries may be used. Chesapeake & Ohio Ry. vs. Kelly, 241 U. S. 485.

Pecuniary loss to be recovered may include damages, "when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation." Michigan Central R. R. vs. Vreeland, 227 U. S. 59-71.

There are certain features common to all the claims. Claimants offered an insurance actuary as a witness. He testified as to the joint expectation of life of the deceased and beneficiary. Since there is no evidence in the record

to the contrary, we must accept that testimony as part of a reasonable basis for the determination of the amount to be awarded in each case. The actuary also testified as to the present value of money capitalized at 3½ and 4% per annum interest. On this testimony claimants contend that they should have been awarded damages on the present value of the amount of annual income lost for the joint expectancy of life, capitalized at 3½%.

Six claims were presented for the benefit of the widows of the deceased seamen. Every widow testified, in substance, that her husband was strong and healthy, sober and industrious and devoted to his wife and family; that he turned over his entire wages to her every month and used [fol. 448] not over $10 to $15 per month for his personal expenses. However, it also appears that the wives paid all the bills for the support of the family and, in some instances, instalments on articles bought on time. Three of these claims were also for the benefit of minor children. There is nothing in the evidence, except the general statement of the widow that the father was devoted to his children and gave them his care and affection when at home, to show the pecuniary value of his services to the children or that another would of necessity have to be employed to furnish the same care.

We must endeavor to do justice between the parties, the company as well as the claimants. There is no mathematical formula for exactly determining the loss. Any amount fixed is of necessity hypothetical. We may not consider what might happen in the future. The earnings of the deceased might have increased or diminished had they lived. Some beneficiaries might squander their recovery in a year or two. Others might preserve it intact for many years, using only the annual interest or by successful business ventures double it. All this is too speculative to have a place in determining the award.

The legal rate of interest in Texas is 10% per annum. Doubtless many well secured loans are made at that rate: United States bonds as a rule do not pay more than 3%, but there are many state bonds and sound industrial securities that pay at least 6% per annum interest. Courts are not bound to adopt either the highest or the lowest rate of interest in determining the amount to be awarded. In Ramjak vs. Austro-American S. S. Co., 186 Fed. 417, we

adopted the rate of 6% per annum as reasonable in determining the decreased earning capacity of a passenger injured on a vessel. In U. S. vs. Boykin, 49 F. (2d) 762, we [fol. 449] again adopted the rate of 6% per annum in awarding damages to a father for the death of his son. We consider that rate just and reasonable.

Assuming the testimony of the widows to be truthful, it is beyond dispute that the husbands, upright, faithful and devoted, derived as much benefit from the upkeep and happiness of the family as did the wives. We consider it to be a fair estimate to say the family had lost an amount equivalent to one-half of what the husband and father earned.

We may take up the various awards in the order in which they appear in the judgment, allowing recoveries in round figures to conform as near as they may to a fair estimate of the damages suffered.

William Brennan was master of the tug. His wages were $200.00 per month at the time of his death. His average earnings for thirteen months had been $161.58 per month. A claim was filed for the benefit of his widow, Sophie Brennan, and three minor children, Audrey, aged 8, William aged 6 and Gloria, aged 3. Judgment was rendered for $21,000.00, in proportions of $15,000.00 to the widow, $1,500.00 to Audrey, $2,000.00 to William and $2,500.00 to Gloria. Fixing the loss to the widow and children at $1,200.00 per annum, an amount of $15,250.00, capitalized at 6% for the life expectancy, which was 24 years, would fully cover the loss. The statute does not require that the court should apportion the recovery among the beneficiaries, Central Vermont Railway vs. White, 238 U. S. 507, but it is usually done. Where there are a number of beneficiaries in the class entitled to recover, and the evidence discloses that their expectancies are different, it is proper to do so. In the case of a recovery for the benefit of a widow and her minor children there is hardly any need to apportion the amount between them. Naturally, the minor children will [fol. 450] receive full benefit from any award made to the mother. However, the District Court has seen fit to do so in this case. Appellant has no interest as to this and appellee has made no objection. We do not consider that any distinction should be made between the children because of the difference in their ages. The amount apportioned to them will probably be administered by the mother, as guardian

or trustee. The only practical result of the apportionment would be to have the amount set aside to them, to be available when they reach majority. We consider that the apportionment of $1,000.00 to each of the children would be proper. This will be sufficient to include any theoretical pecuniary recovery for the loss of the father's care and guidance.

Orville Glenn Pyle was chief engineer of the tug. His wages were $190.00 per month at the time of his death. For 13 months his earnings had averaged $182.31 per month. A claim was filed for the benefit of his widow, Bertha M. Pyle. There were no children, issue of the marriage. Judgment was rendered for $20,000.00. The life expectancy was 25 years. Whether there be one or many of the class entitled to recover is not material. Fixing her loss at $1,140.00 annually, she is entitled to an award of $14,750.00.

Cyrus Durio was steward and cook on the tug. His wages were $85.00 per month. His average for 13 months was $86.95. A claim was filed for the benefit of his widow, Mrs. Adolphine Durio, and three minor children, Mildred, aged 16, Earline, aged 13 and Joseph, aged 9. Judgment was rendered for $9,000.00 in proportions of $7,300.00 to the widow, $400.00 to Mildred, $500.00 to Earline and $800.00 to Joseph. The life expectancy was 15 years. Fixing the loss at $510.00 annually $5,250.00 would be an ample recovery on this claim. Considering the advanced ages of the children, it should be apportioned $3,750.00 to the widow and $500.00 to each of the children.

[fol. 451] Stewart J. Causey was classed as a sailor on the tug. His wages were $65.00 per month at the time of his death. For 12 months his earnings had averaged $57.68 per month. He left as beneficiaries his father and mother. A claim was filed for their benefit and judgment was rendered for $3,000.00, proportioned $1,500.00 to each. The father testified that his son was 19½ years of age at the time of his death. The parents lived in Amite County, Mississippi, and owned a farm of 172 acres, of which they cultivated 14 acres and rented 14 acres. The son had been living at Port Arthur, Texas, with his sister and her husband and had gone to school there. It is not shown how long he had been away from home but it is reasonably certain that he had been away for several years. His father testified that his son regularly sent him $20.00 a month, and

sometimes would make it $25.00, but there is nothing to show this but his own testimony. He introduced two letters from his son. In one, dated October 29, 1929, about three months before his death, he apologized for not writing, told about a trip he had taken to New Orleans, Jacksonville and Miami, complained about the cost of living and said he could not save anything but was going to send his father and mother $20.00 and would send them another $25.00 for Christmas and that was the best he could do. In the other letter, dated January 25, 1930, a few days before his death, he again apologized for not having written before, said he was going to make a trip to Pensacola and Tampa and would not be back for some time but he would write them. He made no mention in this letter of having complied with his previous promise or about making any further contributions. The testimony of the father that his son sent him from $20.00 to $25.00 a month has little probative weight. Living away from home, paying all his own expenses and earning only $65.00 a month, it was highly improbable that he could have managed to send his father and mother as [fol. 452] much as $20.00 a month. It is apparent that the father and mother had very little expectation of pecuniary benefit from their son. They were not entitled to recover for his services during minority. N. Y. Central & Hudson River R. R. vs. Tonsellito, 244 U. S. 360. To fix their estimated loss at $100.00 a year would be extremely liberal. The joint expectancy of life was 15 years. An award of $1,000.00, to be divided equally between them, would be ample on this claim.

Joseph Hayden Kenney was mate of the tug. His wages were $165.00 per month at the time of his death and he averaged $168.27 over a period of 13 months. A claim was filed for the benefit of his widow, Ora Kenney and two minor children, Joseph, aged 10, and Kathleen, aged 6. Judgment was rendered for $20,000.00, proportioned $15,300.00 to herself, $2,000.00 to Joseph and $2,700.00 to Kathleen. The life expectancy was 22 years. Fixing the annual loss at $990.00 an award of $12,250.00, proportioned $10,250.00 to the mother and $1,000.00 to each of the children would be ample.

C. L. Nelson was on the tug when she was lost and should be rated as a fireman. There is some question as to whether his name was Charles or Cyrus but that is immaterial as

the recovery is by his personal representative. W. M. Crook presented a claim as administrator and was awarded $7,500.00 for the benefit of Ruth Nelson, now Ruth Nelson Dumas, his widow, who remarried about a year and a half after his death and was subsequently divorced. There is testimony, slight it is true, but admitted without objection and uncontradicted, that he was signed on by the captain of the tug shortly before she departed on her last voyage and he was working his way to Tampa. The tug's papers were all lost with her. The only item shown on the books of the company is that he earned $12.50 in January, which [fol. 453] was due him at the time of his death. The usual rate of pay for firemen on tugs is $65.00 per month. There were no children, issue of the marriage. The widow testified by deposition that her husband sent her $50.00 a month regularly. She had been living at Salem, Massachusetts, since 1926, some four years before the husband lost his life. They were not divorced but he was working in Florida and visited her only occasionally when he could get on a ship that would take him to that part of the country. The widow was earning from $12.00 to $15.00 per week, practically as much as the husband when he was steadily employed. Claimant introduced several letters the widow had received from her husband. None of the letters mentioned the sending of money but one of them promised that he would do so. From the tone of the letters it may be inferred that he intended to send her whatever he could spare when he was earning anything. The burden was on claimant to prove the decedent's employment on the vessel, the rate of wages he received and the beneficiary's reasonable expectancy of future income. There is nothing to show that Nelson had any income other than his pay. The testimony of the widow that her husband regularly sent her $50.00 a month is entitled to no weight as that would leave him only $15.00 per month, if he were employed, to cover his entire expenses, and he must have known she was supporting herself. It is doubtful that claimant has sustained the burden of proving any loss. However, as the commissioner and the District Court were convinced, we will not take a contrary position. Considering all the testimony it can not be said that the beneficiary lost an expectancy of income of more than $20.00 a month. The life expectancy

was 22 years. An award of $3,000.00 would be ample on this claim.

H. A. Anderson was a fireman on the tug. His pay was $65.00 a month at the time of his death. He had averaged [fol. 454] that for a period of 5 months. A claim was filed for the benefit of his widow, Ruth Anderson. There were no children, issue of the marriage. Judgment was rendered for $11,000.00 for her sole use. The widow frankly testified that she did not know how much her husband used for his own expenses or how much he earned; that he regularly gave her $37.50 every two weeks while they were married, which was a period of one year and 28 days. It is not shown that he had any source of income other than his pay. It was manifestly impossible for him to have given his wife $75.00 a month, to say nothing of paying his own personal expenses. The life expectancy was 20 years. Fixing the annual loss of income at $390.00 an award of $4,750.00 would be ample.

The cross appeal is taken to the rejection of a claim filed by Mrs. Jennie Royakers as administratrix to recover damages for the death of her son, Edward C. Van Beck, who was second mate on the Coney. It appears from a stipulation in the record that Edward C. Van Beck left surviving him his mother and a brother aged 34.. After filing the claim his mother died in July, 1931, before an award had been recommended by the commissioner. The brother, Charles Van Beck, qualified as administrator of the estate of his brother and was substituted in place of his mother, the former administrator. Cross appellant contends that judgment should have been granted for the amount recommended by the commissioner, $700.00.

The statute (T. 45 U. S. C. A. §51) creates three classes of beneficiaries, (1) the surviving widow or husband and children of the employee, (2) the employee's parents and (3) the dependent next of kin of the employee. Each class excludes those following, in the order named, and non-dependent collaterals are not entitled to recover. Before the passage of the Merchant Marine Act there could be no re- [fol. 455] covery for damages for the death of a sailor occurring on the high seas. Nor could there be any recovery for death of a common law. In Martin's Administrator vs. Blto. & Ohio R. R., 151 U. S. 673-703, an action was brought by Martin to recover damages for personal

injuries to himself. A verdict was directed for defendant. Pending an appeal, Martin died and his administrator was substituted. On suggestion of his death, in the Supreme Court, it was held that the action abated by the death of the injured party, under the law of Virginia, where the action was brought, and that the administrator had no right to maintain the action. In Chicago, Burlington & Quincy R. R. Co. vs. Wells-Dickey Trust Co., 275 U. S. 161, it was held that the liability is to one of the three classes named in the act and not to the several classes collectively; and if the person entitled to recover at the time of the employee's death dies before a recovery of the compensation, the cause of action dies also.

There is no doubt that the cause of action abated with the death of the mother, who at the time of her son's death was the sole beneficiary entitled to recover, to the exclusion of all others. It is clear there could be no recovery on this claim.

The judgment awarded interest to the claimant at the rate of 6% per annum from February 28, 1935, the date of the filing of the commissioner's report. The report merely recommended the amounts to be awarded and did not fix the liability of the company. The act does not provide for interest before the damages are determined. Cortes vs. Baltimore Insular Line, 66 F. (2d) 526. In admiralty the allowance of interest is discretionary with the court. In this case interest should be allowed at the rate of 6% per annum from July 18, 1935, the date the decree was entered in the District Court.

[fol. 456] On the appeal the judgment is amended to conform to our views above expressed. As so amended it is affirmed. Costs in the District Court to follow the judgment. Costs of appeal to be divided; one-half to appellants and one-half to appellees, in proportion to the various amounts of their recoveries.

On the cross appeal the judgment is affirmed.

Judge Walker concurred in the disposition of this case but died before the opinion was handed down.

[fol. 457] JUDGMENT

Extract from the Minutes of August 14th, 1936

No. 7876

SABINE TOWING COMPANY, INC., et al.,

versus

SOPHIA BRENNAN et al.,

No. 7977

CHARLES VAN BEECK, Administrator of the Estate of Edward C. Van Beeck,

versus

SABINE TOWING COMPANY, INC., et al.

This cause came on to be heard on the transcripts of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court on the main appeal be, and the same is hereby, amended to conform to the views expressed in the opinion of this Court, and as so amended, that said judgment be, and it is hereby, affirmed; costs in the District Court to follow the judgment, costs of appeal to be divided; one-half to appellants and one-half to appellees, in proportion to the various amounts of their recoveries. It is further ordered, adjudged and decreed that on the cross-appeal the judgment of the said District Court is affirmed;

It is further ordered, adjudged and decreed that on the main appeal the appellants, Sabine Towing Company, Inc., and others, and the surety on the appeal bond herein, Trin-[fol. 458] ity Universal Insurance Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court, and that the appellees, Sophia Brennan, and others, be condemned, in solido, to pay one-half of the costs of this cause in this Court. It is further ordered, adjudged and decreed that on the cross-appeal, the cross-appellant, Charles Van Beeck, Administrator of the estate of Edward

C. Van Beeck, and the surety on the cross-appeal bond herein, Massachusetts Bonding & Ins. Co., be condemned, in solido, to pay the costs of this cause in this Court on said cross-appeal.

[fol. 459] Motion and Order Staying Mandate—Filed August 31, 1936

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 7876

Sabine Towing Company, Inc., et al., Appellants,

versus

Sophia Brennan et al., Appellees

and

No. 7977

Charles Van Beeck, Administrator of the Estate of Edward C. Van Beeck, Cross-Appellant,

versus

Sabine Towing Company, Inc., et al., Cross-Appellees

Motion of Sophia Brennan, et al., appellees and claimants, and Charles Van Beeck, Administrator of the Estate of Edward C. Van Beeck, cross-appellant and claimant, in the above entitled and numbered causes, suggests and shows:

That all of said claimants desire to apply for writs of certiorari from the Supreme Court of the United States, and for this purpose desire to secure an order of Court staying the mandate of this Court for a reasonable time, as provided by law (U. S. C. A., Title 28, Section 350); and that "such reasonable time" within the meaning of said statute and the circumstances of the case, would be and is for a period of sixty days from the date of the entry of final judgment, to-wit: the 14th day of August, 1936.

The said Charles Van Beeck, Administrator of the Estate of Edward C. Van Beeck, cross-appellant and one of the claimants, further shows unto the Court that at the time of [fol. 460] entering the order denying the cross-appeal herein, the District Judge entered the following order:

"In the foregoing petition for cross-appeal and upon reading and ordering filed the accompanying cross-assignments of error, the above appeal is allowed upon the petitioner furnishing good and sufficient bond on appeal in the sum of two hundred and fifty ($250.00) dollars, said appeal to be returnable to the United States Circuit Court of Appeals for the Fifth Circuit, according to law." (Record in 7977, page 4.)

Said cross-appellant, in pursuance of said order, furnished and filed a bond according to law in the sum of two hundred and fifty ($250.00) dollars, same having been duly approved by the District Court. (R. 5.)

Claimants further suggest and show unto the Court that, in the circumstances of these cases, a stay of the mandate for the time as herein requested cannot possibly have the effect of burdening Sabine Towing Company, Inc., the appellant and cross-appellee in said causes, with any damages or additional costs, or of causing any other substantial injury; and that, therefore, there is no good or substantial reason for conditioning the stay of the mandate herein prayed for on the giving of good and sufficient security or bond.

All of said claimants desire to make an application to the Supreme Court of the United States for writs of certiorari and for this purpose desire an order of Court staying the mandate for a period of sixty (60) days from the date of the entry of final judgment; and they pray that the Court enter such order without requiring of said claimants any security or bond.

M. G. Adams, H. C. Hughes, Proctors for all of the Claimants.

[fol. 461] On consideration of the application of the said claimants, appellees and cross-appellant, in the above numbered and entitled causes, for a stay of a mandate to this Court, enabling the said claimants to apply for and obtain writs of certiorari from the Supreme Court of the United

States, it is ordered that the issuance of the mandate of this Court in the said causes be and the same is stayed for a period of sixty (60) days from the date of the entry of the final judgment herein, to-wit: sixty (60) days from the 14th day of August, 1936; the said stay to continue in force until the final disposition of the cases by the Supreme Court, provided that within the sixty-day stay period herein allowed, there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof, in accordance with the existing rules of the Supreme Court of the United States, has been given.

It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or writs, or upon the expiration of said sixty-day period from the date of the entry of the judgment, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Done at Atlanta, Georgia, this 28 day of August, 1936.

(Signed) Sam'l H. Sibley, United States Circuit Judge.

[fol. 462] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 443 to 461 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in certain causes in said Court, numbered 7876 and 7977 respectively, wherein Sabine Towing Company, Inc., et al., are appellants and Sophia Brennan, et al., are appellees, and Charles Van Beeck, Administrator of the Estate of Edward C. Van Beeck, is cross-appellant, and Sabine Towing Company, Inc., et al., are cross-appellees as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed records numbered from 1 to 442 are identical with the printed records upon which said causes were heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 1st day of September, A. D. 1936.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 463] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 16, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the question whether the cause of action abated with the death of the mother of Edward C. Van Beeck.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 464] IN SUPREME COURT OF THE UNITED STATES

STIPULATION DESIGNATING PARTS OF RECORD TO BE PRINTED—Filed December 14, 1936

It is hereby stipulated and agreed by and between counsel of record for all parties in the above entitled and numbered cause that only the following parts of the record as filed in this court need be printed by the clerk, or under his supervision, for the hearing of said cause in the Supreme Court, to-wit:

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1. Caption	
2. Petition for Limitation of Liability	2–9
3. Amended claim and answer of Sophia Brennan, et al.	34–42
4. Interlocutory decree on issue of liability	46–50
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6. Report of the commissioner, consisting of only the following parts:	
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8. Suggestion of the death of Mrs. Jennie Royackers and order of substitution of Charles Van Beeck as administrator	390

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9. Findings of Fact and Conclusions of Law:	
(a) Opening paragraph	391
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10. Conclusions of Law	395–396
11. Final decree	396–400
12. Petition for appeal and order thereon and assignments of error	401–406
13. The entire record in the cross appeal of Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, vs. Sabine Towing Company, Inc., et al., except those parts usually omitted by the clerk and merely designated; but at least there should be printed the petition for cross appeal, cross assignments of error and the order of the court, as shown	433–435
14. Only that part of the opinion or decision rendered by the Circuit Court of Appeals relating to the said cross appeal, commencing about the middle of page 454 and ending about the middle of page 455 of the record, the beginning being "The cross appeal is taken to the rejection of a claim filed by Mrs. Jennie Royackers," etc.; and the ending being, "It is clear there could be no recovery on this claim."	454–455
15. Clerk's certificate	

[fol. 466] M. G. Adams, Counsel of Record for Charles Van Beeck, Administrator, etc. M. A. Grace, Counsel of Record for Sabine Towing Company, Inc., et al.

[fol. 467] [File endorsement omitted.]

Endorsed: Enter M. G. Adams. File No. 41,000. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 460. Charles Van Beeck, Administrator, etc., petitioner, vs. Sabine Towing Company, Inc., et al. Petition for writs of certiorari and exhibit thereto. Filed October 12, 1936. Term No. 460, O. T., 1936.

FILE COPY

FILED

OCT 12 1936

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 459-460

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
PETITIONERS,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

CHARLES VAN BEECK, ADMINISTRATOR,
PETITIONER,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

M. G. Adams,
H. C. Hughes,
Counsel for Petitioners.

Howth, Adams & Hart,
Lockhart, Hughes & Lockhart,
Of Counsel.

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"Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, deceased, was entitled to recover the amount of damages accrued from the death of the son to the death of the mother, as found by the commissioner.

(Based on Reasons for Allowance of Writ and Specification of Assigned Errors Nos. 1 and 2.)"

7. Point Two..... 31

"The concurrent fact findings of the commissioner and of the District Court were, under the established practice in this court and in all of the lower courts, binding and conclusive upon the Circuit Court of Appeals.

(Based on Reasons for Allowance of Writ and Assigned Error No. 3.)"

8. Point Three. 39

"In holding that, as a matter of fact, notwithstanding all of the evidence to the contrary, the families would have received only one-half of the money salaries being earned by the decedents, the court below violated the fundamental principle that judgments must be based upon the evidence and not upon mere conjecture.

(Based on Reasons for Allowance of Writ and Assigned Error No. 4.)"

9. Point Four. 42

"The rate of three and one-half per cent (3½%) was shown by the uncontroverted testimony to be the proper and reasonable rate for calculating the present worths of the money contributions, and the Circuit Court, in disregarding this testimony and using six per cent (6%), committed fundamental error.

(Based on Reasons for Allowance of Writ and Specification of Error No. 5.)"

10. Point Five. 49

"If the evidence shows that the parents are qualified, as it does in the case at bar, the pecuniary value of the nurture and loss of intellectual, moral and physical training of the children should be estimated, as a matter of law, from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00); and this is a separate and distinct item from the present worth of the money contributions and should not be subtracted from, but allowed over and above the present worths.

(Based on Reasons for Allowance of Writ and Specifications of Assigned Error Nos. 6 and 7.)"

11. Point Six. 53

"In the Causey claim the father's common-law right to the earnings of his child during minority did not enter into nor become a part of the award made to the father and mother. The evidence shows that the present worth of the minor's actual money contributions of twenty dollars ($20.00) a month during the joint life expectancy was the sum of three thousand four hundred thirty-one and 15/100 ($3,431.15) dollars (R. 215).

(Based on Reasons for Allowance of Writ and Specification of Error No. 8.)"

12. Point Seven. 54

"When the commissioner determined and assessed the amount of the awards the damages became liquidated, subject only to the District Court's approval, and the trial court acted clearly within its reasonable and discretionary powers in finding as a fact, under all the circumstances, that interest should run, and in decreeing that it should run, from the date of the filing of the commissioner's report.

(Based on Reasons for Allowance of Writ and Specification of Assigned Errors Nos. 9 and 10.)"

13. Point Eight. 58

"The undisputed evidence required the commissioner and both courts below to find the amount of damages in accordance with the calculations of present worths of the money contributions to the families; and if commissioners and courts are permitted to use, according to personal predilection, the present worth calculations, based on the necessary elements that are shown in the record by the

uncontroverted testimony, then they can at will wholly disregard such calculations; and there cannot be, in the nature of the matter, any rule as to part of the present worth calculations must be controlling.

(Based on Reasons for Allowance of Writ and Specification of Assigned Error No. 11.)"

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. .....

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
PETITIONERS,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

CHARLES VAN BEECK, ADMINISTRATOR,
PETITIONER,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Sophia Brennan, administratrix of the estate of William Brennan, deceased; Bertha M. Pyle, administratrix of the estate of Orville Glenn Pyle, de-

ceased; Adolphine Durio, administratrix of the estate of Cyrus Durio, deceased: R. L. Causey, administrator of the estate of Stewart Causey, deceased; Ora Kenney, administratrix of the estate of Joseph Hayden Kenney, deceased; W. M. Crook, administrator of the estate of C. L. Nelson, deceased; Ruth Anderson, administratrix of the estate of H. A. Anderson, deceased; and Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, deceased, petitioning from a final decree of the United States Circuit Court of Appeals for the Fifth Circuit drastically reducing all damages assessed by the commissioner and approved by the trial court, and wholly denying one claim, respectfully shows to this Honorable Court:

I.

CONDENSED STATEMENT OF MATTER INVOLVED.

On January 27, 1930, the tug, Edgar F. Coney, sank in the Gulf of Mexico, resulting in the loss of all the fourteen members of the crew. On June 27, 1930, the Sabine Towing Company, Inc., owner of said tug, filed its petition in the United States District Court for the Eastern District of Texas for "exoneration from or limitation of liability," for the loss of the lives of said crew (R. 2-10). Therein the personal representatives of only eight deceased members of the crew filed their claims on behalf of their respective legal beneficiaries (R. 19-42).

The District Court having entered an interlocutory judgment denying exoneration from or limitation of lia-

bility, holding the owner of the vessel guilty of negligence "with knowledge and privity in sending out a vessel unseaworthy in the respects found by the court" (R. 46-50), and an appeal therefrom being taken to the United States Circuit Court of Appeals for the Fifth Circuit and that court having affirmed the judgment of the court below on the question of liability (with Judge Foster dissenting, 72 F. (2d) 490), and an application for certiorari being made and denied (293 U. S. 611, 55 S. Ct. 141), the assessment of the damages came on for determination in the District Court.

All parties to the litigation in the District Court, consisting of the Sabine Towing Company, Inc., petitioner therein, and all of the claimants, agreed that the assessment of the damages should be made by a commissioner, and themselves unanimously selected Samuel C. Lipscomb, Esquire, a man of undoubted integrity and reputation, and a lawyer of large experience in similar matters, acquired as counsel for corporations, and the court thereupon appointed the said Lipscomb to hear the testimony, to find the facts, assess the damages and report his findings to the court (R. 50).

Said commissioner heard all of the witnesses personally (R. 50-340), except only with respect to the claims of Mrs. C. L. Nelson, whose testimony was by deposition (R. 147-162), and of Charles Van Beeck, administrator, which was by stipulation (R. 163).

The commissioner found the facts and assessed the damages (R. 341-352).

He found the basic facts, in each claim, upon which the mathematical calculations of the present worths of the money contributions to the respective families were properly made. The evidence supporting the following basic fact findings in each case was not in dispute and the commissioner found said facts accordingly, to-wit: First, the amounts being earned by the decedents at the time of their death; second, the ages of the decedents and of their beneficiaries; and, third, their joint life expectancies (R. 348-352).

Another fact element necessary for the calculations of present worths was the amount of money or that part of his earnings each decedent was contributing to his family, that is, what amount he used or probably would use for his personal expenses. This was the only basic fact in dispute. The wives of Brennan, Kenney, Pyle and Durio testifying that the checks for the salaries of their husbands from the Sabine Towing Company were delivered to them respectively for the use of the family and that out of the amount so received, the husband used only the sum of from ten dollars ($10.00) to fifteen dollars ($15.00) a month for personal expenses, and the families used the remainder; and the only controverting evidence being that by Ball, president of Sabine Towing Company, testifying that in his opinion twenty-five dollars ($25.00) to thirty dollars ($30.00) a month would have been a reasonable allowance for the personal expenses of the deceased members of the Coney crew (R. 276). On this fact issue the commissioner agreed with Ball, finding that the per-

sonal expenses of each one of the deceased members of the crew was twenty-five dollars ($25.00) a month (R. 345).

It was undisputed that each of the decedents received as a part of his wages the value of room and board and that this was over and above the money amounts being paid them as salaries (R. 53); said amounts paid them as wages not being in dispute, and found by the commissioner, in each instance, in accordance with the undisputed testimony, to-wit: Brennan, two hundred dollars ($200.00) a month (R. 349); Pyle, one hundred ninety dollars ($190.00) (R. 350); Anderson, seventy-five dollars ($75.00) (R. 350); Durio, one hundred dollars ($100.00) (R. 351); Nelson, sixty-five dollars ($65.00) to eighty dollars ($80.00) (R. 351); Causey, sixty dollars ($60.00) (R. 352).

The only remaining fact element necessarily entering into the present worth calculations of the money contributions is the rate of interest to be used. Mitchell, a thoroughly qualified expert insurance actuary (R. 175-176), testified that three and one-half per cent (3½%) was the reasonable and correct rate of interest to be used (R. 181), based on the general usage of the large insurance companies that make their investments on the expectation of average earnings of three per cent (3%) and (3½%), most of them being on the basis of three per cent (3%) (R. 181, 220, 221, 232). His testimony was not controverted, but was apparently satisfactory to all litigants, and the respondent produced no other actuary. *Chesapeake & O. Ry. Co.* v. *Kelly*, 241 U. S. 485, 36 S. Ct. 630.

The facts as to the earnings of Edward C. Van Beeck, deceased, and his contributions to his mother were stipulated at from thirty dollars ($30.00) to fifty dollars ($50.00) a month (R. 163).

In deference to the commissioner's fact finding that the decedents would more likely have used twenty-five dollars ($25.00) for personal expenses, claimants conceded that amount as a reasonable personal expenditure of each decedent and this renders undisputed all of the fact elements used in making the mathematical calculations to determine the present worths of the money contributions from each decedent to his family; the present worths being, of course, those amounts necessary to purchase annuities, paying the same monthly income the families were receiving from the decedents (Mitchell, R. 182).

Basing his calculations upon these undisputed facts and using both the three and one-half per cent (3½%) deemed proper, and also the six per cent (6%) as arbitrarily used by the Circuit Court, Mitchell's calculations are shown in the following tabulation:

Age of beneficiary and deceased	Probable joint life expectancy	Monthly salaries less $25.00	Present value on American Annuitants Table 3½% value	Present value on American Annuitants Table at 6% value
		Sophia Brennan & Husband		
27-25	24	$175.00	$35,250.76 (R. 218)	$28,735.00 (R. 236)
		Bertha M. Pyle & Husband		
24-34	25	$165.00	$34,226.27 (R. 218)	$27,643.00 (R. 236)
		Adolphine Durio & Husband		
49-50	15	$ 80.00	$11,557.47 (R. 218)	$10,501.00 (R. 236)
		R. J. Causey and Son		
57-19	15	$ 20.00	$ 2,888.92 (R. 214)	$ 2,471.00 (R. 236)
		Ora Kenney & Husband		
34-35	22	$140.00	$26,796.34 (R. 218)	$22,209.00 (R. 236)
		Ruth Nelson & Husband		
39-33	22	$ 40.00	$ 7,658.77 (R. 218)	$ 6,893.00 (R. 236)
		Ruth Anderson & Husband		
45-38	20	$ 65.00	$11,588.92 (R. 218)	$10,213.00 (R. 236)

Mitchell further testified that the above amounts represented the monies that should have been paid immediately upon the death of the decedents, to-wit, on the 28th day of January, 1930; but inasmuch as the amounts were not paid at that time, substantially five years' interest at the same rate used in each instance should be added, because if the amount had been paid when due, the beneficiaries would have been receiving three and one-half per cent (3½%) thereon, or if they had purchased annuities with the amounts shown as the present worths of the contributions, they would have been receiving from the insurance company their respective monthly contributions (R. 183-187).

With the five years' interest added, as calculated by Mitchell, the respective amounts representing the true present worths at three and one-half per cent (3½%) and at six per cent (6%) at the time of hearing before the commissioner are as follows:

True present value at 3½% with five years accumulated interest added.		True present value at 6% with five years accumulated interest added.
	Sophia Brennan & Husband	
$41,866.98 (R. 219)		$38,454.00 (R. 236)
	Bertha M. Pyle & Husband	
$40,650.20 (R. 219)		$36,993.00 (R. 236)
	Adolphine Durio & Husband	
$13,726.69 (R. 219)		$13,053.00 (R. 236)

R. J. Causey & Son	
$ 3,431.15 (R. 215)	$ 3,307.00 (R. 236)
Ora Kenney & Husband	
$31,825.75 (R. 219)	$29,721.00 (R. 236)
Ruth Nelson & Husband	
$ 9,096.24 (R. 219)	$ 8,224.00 (R. 236)
Ruth Anderson & Husband	
$13,764.04 (R. 219)	$13,667.00 (R. 236)

The commissioner found and assessed the damages to which the petitioners were entitled as follows:

To Sophia Brennan, Administratrix, $21,000.00 (R. 349), apportioned:

Sophia Brennan	$15,000.00	
Audrey Brennan	1,500.00	
William Brennan, Jr.	2,000.00	
Gloria Jean Brennan	2,500.00	(R. 349).

To Bertha M. Pyle, Administratrix, $20,000.00 for her sole use and benefit (R. 350).

To Adolphine Durio, Administratrix, $9,000.00, apportioned:

Adolphine Durio	$ 7,500.00	
Mildred Durio	400.00	
Earline Durio	500.00	
Joseph Durio	800.00	(R. 351).

To R. J. Causey, Administrator, $3,000.00, apportioned:

R. J. Causey	$ 1,500.00	
Mrs. Myrtis Causey	1,500.00	(R. 352).

To Ora Kenney, Administratrix, $20,000.00, apportioned:

Ora Kenney	$15,300.00
Joseph Hayden Kenney	2,000.00
Kathleen Kenney	2,700.00 (R. 348-349).

To W. M. Crook, Administrator, $7,500.00, for the sole use and benefit of Ruth Nelson (R. 351).

To Ruth Anderson, Administratrix, $11,000.00 for the sole use and benefit of Ruth Anderson (R. 350).

To Chas. Van Beeck, Administrator, $700.00, same being amount of damages accruing to Mrs. Jennie Royakers (mother of deceased) up to the time of her death, July 31, 1931 (R. 353).

All parties duly filed exceptions to the commissioner's findings (those by Sabine Towing Company, R. 353-359; those by claimants, R. 360-389).

The principal complaints of the claimants were: First, that the commissioner had refused to find the respective present worths of the undisputed money contributions, calculated on bases shown by the uncontroverted evidence, but had arbitrarily and conjecturally reduced said amounts to almost one-half; second, that he had erroneously deducted the amount of damages allowed the minors from the present worths of the money contributions to the family; and, third, that he committed error in not awarding the minor in each instance a sum of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) for the loss of the pecuniary

value of the nurture and of the intellectual, moral and physical training (R. 372).

The trial court overruled all of the exceptions to the commissioner's report and entered the following order:

"Upon a careful consideration of all the facts introduced upon the question of damages before the commissioner, Hon. Samuel C. Lipscomb, and after the full consideration of the report of the said commissioner heretofore filed herein, I overrule all exceptions to said report and adopt the findings of the said commissioner as my findings and herewith file the following findings of fact and conclusions of law." Then followed the trial court's specific findings of fact in each claim (R. 391-395), and then his conclusions of law of the tenor following:

"I conclude, as a matter of law, that the personal representatives of Joseph H. Kenney, William Brennan, O. G. Pyle, H. A. Anderson, C. Durio, C. L. Nelson, Stewart Causey and Edward Van Beeck, be and they are entitled to recover the damages hereinabove found with interest thereon at six per cent from the date of the filing of the commissioner's report" (R. 395-396); and final decree was entered in accordance therewith, except that the trial court wholly denied the claim of Charles Van Beeck, administrator, and refused him any recovery (final decree, R. 396-400).

From this judgment the Sabine Towing Company appealed and your petitioners duly filed and prosecuted in said appeal their cross assignments of error based

on their exceptions to the commissioner's report and to the trial court's action in denying any damages to Charles Van Beeck, administrator (R. 407-417).

Charles Van Beeck, administrator, perfected his appeal from the trial court's final judgment denying him any recovery (R. 430-444). The United States Circuit Court of Appeals for the Fifth Circuit heard and decided both of said appeals together and rendered its decision affirming that part of the judgment of the District Court, denying damages to Charles Van Beeck, administrator; reduced the damages adjudged by the lower court to all of the other petitioners to about one-half of that recommended by the commissioner and allowed by the District Court; and reversed and rendered that part of the judgment below allowing interest to the claimants at six per cent on their judgments from the date of the filing of the commissioner's report, to-wit, the 28th day of February, 1935 (R. 447-455).

The amounts of the money contributions being made to the respective families, in each case, were conclusively established by the undisputed testimony, as above shown; but the Circuit Court of Appeals wholly disregarded this evidence and arbitrarily set its own standard of one-half of the earnings of the decedents as being the probable money contributions to the families; and this is expressly shown by the following excerpt from the opinion:

> "Assuming the testimony of the widows to be truthful, it is beyond dispute that the husbands, upright, faithful and devoted, derived as much benefit from the upkeep and happiness of the family as did

the wives. We consider it to be a fair estimate to say the family had lost an amount equivalent to one-half of what the husband and father had earned" (R. 450).

The Circuit Court based its calculations of the damages, in each instance, on its said arbitrary standard arrived at without any supporting evidence whatever that the families would receive only one-half of their decedent's salaries and reduced all of the amounts assessed by the commissioner and adjudged to the claimants by the District Court, in some instances by about one-third and in others more than one-half; the amounts allowed by the Circuit Court of Appeals being as follows:

To Sophia Brennan, Administratrix, $15,250.00, apportioned:

Sophia Brennan	$12,250.00
Audrey Brennan	1,000.00
William Brennan, Jr.	1,000.00
Gloria Jean Brennan	1,000.00

To Bertha M. Pyle, Administratrix, $14,750.00, for her sole use and benefit.

To Adolphine Durio, Administratrix, $5,250.00, apportioned:

Adolphine Durio	$ 3,750.00
Mildred Durio	500.00
Earline Durio	500.00
Joseph Durio	500.00

To R. J. Causey, Administrator, $1,000.00, apportioned:

R. J. Causey	$500.00
Mrs. Myrtis Causey	500.00

To Ora Kenney, Administratrix, $12,250.00, apportioned:

Ora Kenney	$10,250.00
Joseph Hayden Kenney	1,000.00
Kathleen Kenney	1,000.00

To W. M. Crook, Administrator, $3,000.00, for the sole use and benefit of Ruth Nelson.

To Ruth Anderson, Administratrix, $4,750.00, for her sole use and benefit.

As to Charles Van Beeck, Administrator, the judgment against him was affirmed.

That the final awards *prima facie* are unjust is demonstrated by the fact that though it has been more than six and one-half years since the death of the decedents, during all of which time the beneficiaries should have been receiving their monthly contributions, the Circuit Court, as expressly appears from its opinion, reduced the money contributions that should have been received up to the present by calculating the present worths thereof, as if the whole amount were paid as of January 28, 1930, whereas, the full amounts of said contributions to date of judgment should have been allowed together with interest thereon; and then the present worths of the said money contributions should have been calculated from the date of the judgment to the expiration of the respective joint life expectancies.

What the beneficiaries have actually lost up to the present time is not a matter of theory, but of mathe-

matical fact, as clearly appears from simple calculations as follows:

At the time the judgment of the Circuit Court of Appeals was rendered, based on the family income of one hundred seventy-five dollars ($175.00) a month, the petitioner, Sophia Brennan and her three minor children had lost in six and one-half years thirteen thousand six hundred fifty dollars ($13,650.00) with more than seventeen years left of their unexpired term of their joint life expectancy; from a family income of one hundred sixty-five dollars ($165.00), the petitioner, Bertha M. Pyle, had lost the sum of twelve thousand eight hundred seventy dollars ($12,870.00) with more than eighteen years left of the unexpired term of their joint life expectancy; Adolphine Durio and her three minor children had lost five thousand eight hundred fifty dollars ($5,850.00) with more than eight years left of the unexpired term of their joint life expectancy; R. J. Causey and wife had lost one thousand five hundred sixty dollars ($1,560.00) with more than eight years left of the unexpired term of their joint life expectancy; Ora Kenney and her three minor children had lost ten thousand nine hundred twenty dollars ($10,920.00) with more than fifteen years left of the unexpired term of their joint life expectancy; Ruth Nelson had lost more than three thousand one hundred twenty dollars ($3,120.00) with more than fifteen years left of the unexpired term of their joint life expectancy; and Ruth Anderson had lost five thousand seventy dollars ($5,070.00) with more than twelve years left of the unexpired term of their joint life expectancy. *The Spokane* (CCA 2), 294 F. 243, 247.

Judge Foster, who wrote the dissenting opinion on the issue of liability in the first appeal, was the only member of the court who heard both appeals.

II.

REASONS FOR ALLOWANCE OF WRIT.

1. Both courts below erred with respect to the Van Beeck claim in holding that the personal representative of Edward C. Van Beeck, deceased, was not entitled to recover for the benefit of the estate of Jennie Royakers, the mother of deceased, for the value of the probable money contributions from the date of the son's death up to the date of the mother's death, for that, as shown by the undisputed evidence, the said Edward C. Van Beeck was unmarried, left no surviving widow nor children, and his mother being the sole surviving member of the next class of beneficiaries named in the statute and entitled to recover, and in whom immediately vested a cause of action at her son's death, and her personal representative having filed and prosecuted the claim for her benefit up to the date of her death, was entitled to recover (U.S.C.A., Title 45, Section 51). Both courts based their erroneous conclusion upon their misconstruction of the case of *Chicago, B. & Q. Ry. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, 48 S. Ct. 73, 72 L. Ed. 216. In this case the Supreme Court has, we think, settled the proper construction of said statute with respect to the right of the beneficiaries named in the statute to recover damages up to the time of the death of the beneficiary, and settled it (at least by implication) contrary to the holding of the lower courts; but if not, then the Circuit Court of Appeals "has decided an important question of federal law, which has not been, but should be, settled by this court."

2. Such holding of the Circuit Court of Appeals with respect to the Van Beeck claim is in conflict with decisions of another Circuit Court of Appeals and of a District Court; and said court has thus "decided an important question of general law in a way probably untenable and in conflict with the weight of authority," as shown by the following decisions: *Union Steamboat Co.* v. *Chaffins' Administrators* (CCA 7), 204 F. 417; *The City of Rome*, (D. C. N. Y.) 48 F. (2d) 341-342; *Sider* v. *General Electric Co.*, 238 N. Y. 64, 143 N. E. 792, 34 A. L. R. 156.

3. The Circuit Court of Appeals erred in failing "to give to the findings of the commissioner the weight to which they were entitled and in refusing to treat them as correct, binding and conclusive and not to be disturbed unless clearly in conflict with the weight of the evidence upon which they were made," the said commissioner having heard all of the witnesses personally except as to the Nelson and Van Beeck claims, and all of his findings having been expressly approved by the District Court after review by that court of the testimony, and all of the said fact findings being based either upon the undisputed testimony or the overwhelming preponderance thereof, and all parties having assented to the reference of said matters to a commissioner and having unanimously agreed upon the person to be appointed by the court; and such action on the part of the Circuit Court of Appeals is clearly in conflict with the following decisions: *Kimberly* v. *Arms, et al.*, 129 U. S. 512, 9 S. Ct. 355; *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 236; *Crawford* v. *Neal*,

144 U. S. 585, 12 S. Ct. 759; *The Eastland*, (CCA 7) 78 F. (2d) 984, 988, and cases cited; *The June Ames*, (CCA 2) 66 F. (2d) 415; *Packard* v. *Southern States Power Co.*, (CCA 5) 46 F. (2d) 789; *Schock* v. *Malloy*, (CCA 8) 26 F. (2d) 621; *Commercial Natl. Bank of Independence, Kan.* v. *Stockyards Loan Co.*, (CCA 8) 16 F. (2d) 911; *Bailey* v. *Blackmon*, (CCA 4) 3 F. (2d) 252; *Munn, County Treasurer* v. *Des Moines Natl. Bank*, (CCA 8) 18 F. (2d) 269; *The Ernest H. Meyer*, (CCA 9) 84 F. (2d) 496 (Federal Advance Sheets, Sept. 14, 1936); *The Andrea F. Luckenbach*, (CCA 9) 78 F. (2d) 827, 828.

4. The Circuit Court of Appeals found as a fact, without any evidence whatever in the record on which to base the finding, that the families would have received only one-half of the money salaries being earned by the decedents and therein grossly erred to the detriment of petitioners in violating a leading fundamental principle of our jurisprudence, which requires that all judgments be based on proof and substantial evidence as an absolute condition precedent to their validity. If this unsupported fact finding be permitted to stand, said finding will become a settled principle of law and a yardstick to measure and control all similar cases in the future. In this arbitrary act, the court below "indulged in conjecture instead of weighing established facts," and "so far departed from the accepted and usual course of judicial proceedings, as earnestly to call for the exercise of this Honorable Court's power of supervision." *Norfolk & W. R. Co.* v. *Holbrook*, 235 U. S. 625, 35 S. Ct. 143, 145;

Merchants Ins. Co. v. *Baring,* 20 Wall. 159, 22 L. Ed. 250; *Brooklyn Eastern District Terminal* v. *U. S.,* 287 U. S. 170, 53 S. Ct. 103, 105.

5. The lower court also grossly erred in finding as a fact, without any evidence to support it, and notwithstanding the uncontroverted evidence to the contrary, that six per cent was the just and reasonable rate as a basis for calculating the present worths of the money contributions, instead of the three and one-half per cent, as shown by the undisputed testimony of Mitchell, the actuary, as being the reasonable rate, all facts and circumstances considered; and in thus arbitrarily indulging in mere conjecture, instead of following the evidence, said court "so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision." Cases, *supra;* and *Chesapeake & O. R. Co.* v. *Kelly,* 241 U. S. 485, 36 S. Ct. 630.

6 The court below erroneously held that the children had only a right of "theoretical pecuniary recovery" for the loss of the father's care and guidance and carried this erroneous theory into practice by refusing to render judgment in favor of the minors for reasonable and proper amounts for the pecuniary value of the nurture of the child and for the loss of its intellectual, moral and physical training by allowing only from five hundred dollars ($500.00) to one thousand dollars ($1,000.00) for each of the minors. This is in conflict with the weight of authority holding that the value of such training, if the

evidence shows the parent qualified, as it does in the case at bar, should be and usually is estimated at from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00), as shown by the following decisions: *Michigan Central R. Co.* v. *Vreeland, Administrator,* 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417; *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404; *S. W. Power Co.* v. *Price,* 180 Ark. 567, 22 S. W. (2d) 373 (cited in 74 A. L. R., pages 95-103).

7. Both lower courts erred in subtracting the amounts awarded for the loss of reasonable pecuniary value of the nurture of the children and for their loss of intellectual, moral and physical training, from the present worths of the money contributions awarded to the families, thus penalizing the widows who had children and giving them the smallest awards, whereas, such sum should have been awarded as separate and distinct items of recovery and over and above the present worths of the money contributions. This error strongly calls for the exercise of this court's power of supervision. *Michigan C. R. Co.* v. *Vreeland,* 227 U. S. 58, 73, 57 L. Ed. 417, 423; *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404.

8. The Circuit Court erroneously assumed, with respect to the Causey claim, that the parents' common-law right to the minor's earnings entered into and became a part of the award recommended by the commissioner and allowed by the District Court, whereas, on the contrary, the said award was clearly based exclusively on the present worth of the twenty dollars ($20.00)

actual money contribution being made by the son to the father and mother, as shown by the testimony of the father, which was not disputed, nor in any way discredited; and though the commissioner did mention the right of the parents to their son's earnings during minority, it is evident that this did not enter into his estimate of the amount to be awarded, as shown by the commissioner's statement as follows: "The father testified that at times the son sent him twenty dollars ($20.00) per month, at other times twenty-five dollars ($25.00). The father was infirm. The boy was bright and intelligent and showed an affectionate regard for his parents and it is but natural to assume that he would have been of material assistance to them, *regardless of any legal obligation for their support.* Taking into consideration his natural affection, his prospects for future advancements and personal services he might render to his aged parents in their declining years, the award in this case is fixed at three thousand dollars ($3,000.00)" (R. 352). The present worth of the twenty dollars ($20.00) contribution during the probable joint life expectancy of fifteen years is three thousand four hundred thirty-one and 15/100 dollars ($3,431.15) (R. 215). *United States* v. *Boykin* (CCA 5), 49 F. (2d) 762 (involving substantially similar facts and same court awarded five thousand two hundred dollars ($5,200.00), in striking contrast with that allowed the Causeys.

9. The Circuit Court of Appeals erred in reversing and rendering that part of the judgment of the District Court awarding interest on the respective amounts ad-

judged to the petitioners from the date of the filing of the commissioner's report, for that, the District Court, in awarding said interest, was acting within its judicial discretion, and there being no evidence of abuse of discretion, and none being found by the Circuit Court, such holding is in direct conflict with the following decisions: *Union Steamboat Co.* v. *Chaffins' Administrators* (CCA 7), 204 F. 412 at 420; *Chicago D. G. & B. Transp. Co.* v. *Moore* (CCA 6), 256 F. 490 at 507; *Union Steamboat Co.* v. *Fitzgibbon* (CCA 7), 261 F. 768; *The Argo* (CCA 9), 210 F. 872; *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252; *State of Alabama* v. *United States*, 279 U. S. 229, 49 S. Ct. 266.

10. Apparently the Supreme Court has not passed upon the question of whether or not interest can properly be allowed from the date of the filing of the commissioner's report and assessment of damages in causes arising under the Jones Act and that part of the Employers' Liability Act incorporated and made a part of it by reference (46 U.S.C.A., Section 688, and 45 U.S.C.A., Section 51); but it is a matter of such importance that it should be determined by this Honorable Court in the light of its liberal construction of said statutes to attain the remedial ends of such legislation "for the benefit and protection of seamen who are peculiarly the wards of admiralty;" some of the decisions of this Honorable Court involving other but related matters, giving such liberal construction to said statutes, being: *The Arizona, et al.* v. *Anelich* (decided April 27, 1936), 56 S. Ct. 707; *Beadle* v. *Spencer* (decided April 27, 1936), 56 S. Ct.

712; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375, 53 S. Ct. 173, 77 L. Ed. 368; *Jamison* v. *Encarnacion*, 281 U. S. 635, 639, 50 S. Ct. 440, 74 L. Ed. 1082; *Alpha S S. Corp.* v. *Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; *Warner* v. *Goltra*, 293 U. S. 155, 157, 160, 55 S. Ct. 46, 79 L. Ed. 254.

In reversing the District Court's judgment allowing interest from the date of the filing of the commissioner's report, the Circuit Court of Appeals construed the said statutes strictly and in brusque contrast with the spirit of this court's decisions, *supra*; and the case it cites in support of this part of its decision, to-wit, *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526, has no application, since that case involved the allowance of interest from the date of the injuries and not from the date of the filing of the commissioner's report. There is nothing in the statute, either express or implied, inhibiting the allowance of interest either from the date of the injuries or from the date of the filing of the commissioner's report, and the decision below could have been reached only by an unnecessarily strict construction of said statute; the lower court itself saying, "in admiralty the allowance of interest is discretionary with the court" (R. 455).

11. The Circuit Court erred in refusing to increase, instead of reducing the awards—and this applies particularly with respect to the widows and children—so as to make them reasonably commensurate with the undisputed testimony and to harmonize with the present worths as correctly calculated on undisputed bases, and

to render them in reasonable accord with damages allowed in other decisions in the various Circuits involving substantially similar facts; this contention not being inconsistent with the rule of practice that the facts and awards found by the commissioner and approved by the District Court are conclusive in the respect that the said awards cannot be reduced, inasmuch as, under the undisputed evidence, the present worths of the money contributions were in each case from a third to a half larger than the awards made by the commissioner and the District Court; and in no decided cases, within our knowledge, have the awards for damages been reduced below the present worths of the money contributions based on joint life expectancies and the other appropriate mathematical elements, as shown in the following decisions: *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404; *In re Clyde Steamship Co.* (D. C.), 16 F. (2d) 930 (aff. 18 F. (2d) 1015, certiorari denied, 48 S. Ct. 21); *The Columbia* (D. C.), 25 F. (2d) 516 (aff. 25 F. (2d) 518, certiorari denied, 48 S. Ct. 530); *Drowne* v. *Great Lakes Transp. Co.* (CCA 2), 5 F. (2d) 59; *United States* v. *Boykin* (CCA 5), 49 F. (2d) 762.

12. The decision in this case is one of extreme importance not only to petitioners, but to all seamen and their families and beneficiaries throughout the United States, because it defines and limits with a "tight and grudging hand" (*Deslions* v. *La Compagnie, etc.*, 210 U. S. 95, 52 L. Ed. 973. 28 S. Ct. 664), their ultimate rights under the remedial federal statutes aforesaid, which this court has repeatedly held must be construed liberally for the benefit and protection of seamen as "the wards of admiralty." *The Arizona* v. *Anelich, supra.* The decision below ruthlessly reduces them from this high estate of "protected wards" to the low estate of "mis-

treated orphans." It palpably disregards the rule of liberal policy laid down by this court for guidance of the courts below. It absolutely destroys, from inception, those causes of action that have vested by operation of statute and abates them immediately upon the death of the beneficiaries; and if this decision be permitted by this Honorable Court to stand as law, it will result inevitably that because of prolonged delays peculiar to this class of litigation, not a few of such claims will be automatically settled by death, to the profit of the wrongdoer.

This Honorable Court should grant the writ, in this case, not only to correct the many errors above shown, but also "to secure that uniformity of decision" among the lower courts with respect to amounts of damages allowed seamen and their families under substantially the same or similar facts. *Magnum Import Company* v. *Cody*, 262 U. S. 159, 43 S. Ct. 531. In contrast with other awards in the various Circuits, this decision, in its cruel cuts of the already meager awards assessed by the commissioner and approved by the trial court, is distinctly a throwback to the "Dark Ages" for seafarers and their dependents—strangely out of step with the liberal trend of modern judicial thought. Merely as illustrative of this progressive liberalism we cite one of many cases, *Drowne* v. *Great Lakes Transp. Co.* (CCA 2), 5 F. (2d) 59, in which the Second Circuit said:

> "We note that with the increase in the cost of living, awards have been larger. The widow who must live without the aid of her husband is necessarily confronted with the increase in the cost of living and of her children. In the administration of justice, it is the purpose of the law to compensate the dependents as fully as money can for the loss sustained."

Wherefore, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, No. 7876, Sabine Towing Company, Inc., *et al*, appellants vs. Sophia Brennan, *et al*, appellees, and No. 7977, Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, cross appellant, vs. Sabine Towing Company, Inc., *et al*., cross appellees, and that the said decree of the United States Circuit Court of Appeals and of the United States District Court may be both reformed and amended or reversed and rendered in accordance with the foregoing petition, as the case may be, by this Honorable Court, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem just.

M. G. Adams,
H. C. Hughes,
Counsel for said Petitioners.

Howth, Adams & Hart,
Lockhart, Hughes & Lockhart,
Of Counsel.

We certify that we have examined and are familiar with the contents of the foregoing petition; that in our opinion it is well founded and entitled to favorable consideration by the court and that it is not filed for the purpose of delay.

M. G. Adams,
H. C. Hughes.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The decree of the Circuit Court of Appeals, Fifth Circuit, dated August 14, 1936, is found at R. 447-455, but not yet reported.

The decree of the District Court (E. D. Texas), dated July 18, 1935, is found at R. 396, but was never reported.

The commissioner's report and findings are to be found at R. 341-353. The trial court's adoption of the specific fact findings in each claim by the commissioner and his approval of the amount of damages assessed by the commissioner may be found at R. 391-396.

Jurisdiction.

The jurisdiction of this court is based upon U.S.C.A., Title 28, Section 347 (a).

Date of Decree.

The date of the decree to be reviewed is August 14, 1936.

Statement of the Case.

For brevity, we here adopt the statement made under the heading of "Condensed Statement of Matter Involved," set forth in the beginning of the petition. Whatever other evidence may be appropriate we shall add under the points presented to which it may be specially pertinent.

The statutes involved are quoted in the Appendix.

Specification of Errors.

To avoid useless repetition, we here adopt as "Specification of Assigned Errors" to be urged, the "Reasons for Allowance of the Writ," as numbered respectively from 1 to 12, and set forth under that heading in Division II of the petition.

POINT ONE.

Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, deceased, was entitled to recover the amount of damages accrued from the death of the son to the death of the mother, as found by the commissioner.

(Based on reasons for allowance of writ and specification of assigned errors Nos. 1 and 2.)

The deceased, Edward C. Van Beeck, was the son of Jennie Royakers; was mate on board the "Edgar F. Coney," and was drowned on January 27, 1930; and as stipulated by counsel he was contributing to his mother of from $30.00 to $50.00 per month (R. 163). The mother qualified as administratrix, and filed and prosecuted her claim in this cause until her death on July 31, 1931, whereupon a substitute administrator was appointed and continued the prosecution of the claim under the express order of the trial court (R. 390).

The commissioner assessed damages accruing between January 27, 1930, and the date of the mother's death, July 31, 1931, for seven hundred dollars ($700.00) (R. 352-353). The commissioner found facts, and expressly limited the pecuniary loss to the extent of the lifetime of the mother. The District Court approved said fact finding, and did not disapprove the amount at which the damages were assessed by the commissioner, but denied recovery to the administrator on the alleged point of law that the mother's death abated the cause of action from its inception, with respect both to the damages accrued up to the date of the mother's death as well as

thereafter. The trial court's ruling was affirmed by the Circuit Court of Appeals (R. 454-455). Both lower courts based their ruling on the supposed holding by the Supreme Court in *Chicago, Burlington & Quincy R. R. Co.* v. *Wells-Dickey Trust Company*, 275 U. S. 161 (R. 455).

Both courts were clearly in error for the reason that the cause of action vested at the death and that part of the cause of action that had accrued up to the date of the mother's death is not subject to abatement or forfeiture (45 U.S.C.A., Section 51).

The statute provides in case of the death of the employee that the cause of action vests for the benefit of the surviving widow or husband and children of such employee; and if none, then such employee's parents. The undisputed evidence shows that Edward C. Van Beeck was not married, that he had no surviving wife nor children, and that his father was dead; therefore, his mother was the only surviving member of the class in whom the statute vested the cause of action upon the death of the son.

The *Wells-Dickey Trust Company* case, *supra*, supports the right of the administrator to recover. However, the facts of that case were entirely different from those here involved. There, one Anderson was killed and shortly thereafter his mother died, before an administrator was appointed and before the filing of any suit. Moreover, the administrator appointed later did not bring the suit for the benefit of the mother nor for her estate, but on behalf exclusively of the sister of Anderson; the state court having permitted recovery, the judgment was

reversed by this court, which held that the cause of action vested exclusively in the mother; that the statute did not give the sister a right of action, but that such right had already vested under the statute in the mother, and that, therefore, there could be no shifting nor divestiture.

If the mother had been dead at the time of the death of her son, then the cause of action would have vested under the statute in the sister; and such is the holding by this court.

In numerous cases the courts have allowed recovery for estates of deceased beneficiaries under similar statutes.

In *Union Steamboat Company* v. *Chaffins' Administrators,* 204 Fed. 417, the Circuit Court of Appeals for the Seventh Circuit holds, quoting from a New York case, as follows:

> "The right to such damages which thus accrues became an asset of the estate of the beneficiary designated by the statute, and the death of such beneficiary does not prevent nor terminate a right of action to recover damages which have thus been by him suffered," citing *Matter of Mekin* v. *Brooklyn H. R. R. Co.*, 164 N. Y. 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635.

The New York Court of Appeals in *Sider* v. *General Electric Company,* 237 N. Y. 64, 143 N. E. 792, 34 A. L. R. 158, holds, quoting from syllabus, as follows:

> "Damages to be allowed to the widow of one killed by another's negligence, where she dies before trial of the action, are to be limited to the pecuniary loss sustained by her until her death."

In *The City of Rome*, 48 Fed. (2d) 341, 342, the court fully discusses this question, citing the *Union Steamboat Co.* v. *Chaffins' Administrators, supra,* and *Chicago Burlington & Quincy R. R. Co.* v. *Wells-Dickey, supra,* and other cases, and holds that the right of the beneficiary to damages to the date of death does not abate with the death of such beneficiary, but that damages may be recovered up to the time of the death.

POINT TWO.

The concurrent fact findings of the commissioner and of the District Court were, under the established practice in this court and in all of the lower courts, binding and conclusive upon the Circuit Court of Appeals.

(Based on reason for allowance of writ and assigned error No. 3.)

All parties assented to the hearing and determination by a commissioner of all fact issues relating to damages and the amounts to be assessed, and unanimously agreed upon Samuel C. Lipscomb to act as commissioner to hear and determine the damages and he was appointed by the court (R. 50). All of the witnesses appeared before the commissioner personally and their oral evidence was taken before him, except only as to the Nelson and Van Beeck claims (see oral testimony, R. 50-341; deposition testimony in Nelson claim, R. 147-162; and stipulation by counsel as to Van Beeck claim, R. 162-163).

The commissioner made specific fact findings and assessed the amount of damages based thereon, and duly made his report to the court (R. 341-353). All parties having filed their exceptions to the commissioner's report (R. 353-389), the trial court overruled all of said exceptions, adopted all of the specific fact findings made by the commissioner and approved the respective amounts of damages recommended (R. 391-396), and in accordance therewith entered final judgment (R. 396-400), except only as to the claim of the administrator, Edward C. Van Beeck, which was wholly denied (final decree, R. 397-400).

As more specifically shown under "Condensed Statement of Matter Involved," comprising Section I of the foregoing petition, claimants produced, at the trial before the commissioner, Mitchell, a thoroughly qualified insurance actuary, who made mathematical calculations of the respective present worths of the amounts being contributed by the decedents to their families, based upon the undisputed evidence that had already been adduced, showing the respective ages of the decedents and beneficiaries, their joint life expectancies, etc., and based on the rate of interest that was reasonably appropriate, in the circumstances, in the opinion of the actuary, to-wit, at three and one-half per cent (3½%); said opinion as to the rate standing in the record as undisputed and correct, inasmuch as no other actuary or expert was produced by the Sabine Towing Company at the trial.

Not only was there ample evidence to sustain, but the undisputed evidence supported, the following basic ele-

ments upon which Mitchell calculated the present worths, to-wit: 1. The amount being earned by each decedent, the testimony of claimants in each case being corroborated by Ball, the president and general manager of the company (R. 319); 2. The amount reasonably necessary for the personal expenditures and probably actually used by the decedents, the sum of twenty-five dollars ($25.00), as testified to by Ball, being agreed to by claimants, and the remainder of the earnings in each case being contributed to the wife and family; 3. The ages of decedent and wife or beneficiary and the joint life expectancy as thereon calculated by Mitchell; 4. And finally three and one-half per cent (3½%) as the reasonable and correct rate of interest to be used in making the calculations.

Mitchell gave the reasons underlying his opinion that the three and one-half per cent (3½%) rate should be used, to-wit, that the larger insurance companies in the east were using three per cent (3%) and the mid-continent insurance companies were using three and one-half per cent (3½%) (R. 181), that is, that the insurance companies conducted their business on the theory that their extensively ramified investments would earn on an average of from three (3) to three and one-half per cent (3½%); and that claimants being inexperienced in investments could probably not invest their money safely at a greater rate than the major insurance companies (R. 220-221). *Chesapeake & Ohio Ry. Co.* v. *Kelly, Administratrix,* 241 U. S. 485, 36 S. Ct. 630, 632.

The Circuit Court below did not base its action in reducing all of the awards on any evidence nor the

weight nor the preponderance of the evidence in the record, but merely mentioned some of the undisputed evidence and then apparently threw it aside, or substituted its own opinion and conjecture. One of the many evidences of this is shown by the following excerpt from the opinion:

> "There are certain features common to all the claims. Claimants offered an insurance actuary as a witness. He testified as to the joint expectation of life of the deceased and beneficiary. Since there is no evidence in the record to the contrary, we must accept that testimony as part of a reasonable basis for the determination of the amount to be awarded in each case. The actuary also testified as to the present value of money capitalized at three and one-half per cent (3½%) and four per cent (4%) per annum interest. On this testimony claimants contend that they should have been awarded damages on the present value of the amount of actual income lost for the joint expectancy of life capitalized at three and one-half per cent (3½%)" (R., bottom page 448, top page 449).

It is to be noted that the lower court, as appears in the above quotation, announced in advance that although Mitchell's testimony was uncontradicted, the court would accept the testimony only as a "part of a reasonable basis" for determining the amounts to be awarded. What might have been the other part that the court used as a further basis was never disclosed in the opinion, but whatever it was, it could have come only out of the court's own mind as pure conjecture.

What should be the rate of interest used in the calculations depends upon the particular circumstances

and proof in each case. In *Chesapeake & Ohio Ry. Co.* v. *Kelly*, *supra*, the Supreme Court fully discussed the underlying principles; and these identical principles were deliberately and conscientiously followed by counsel in the preparation of the evidence relating to damages in the case at bar; and we think it not out of place here to say that if courts are permitted thus arbitrarily to throw the reasonable and undisputed evidence aside in determining the issues, then counsel ought not to be put to the trouble and expense of adducing the evidence, in the first place.

The parties having unanimously agreed upon the said Lipscomb as commissioner to hear and determine the facts and amount of damages, the trial court entered the following order:

> "It is further ordered that Samuel C. Lipscomb, Esquire, be and he is hereby appointed commissioner herein to take and hear the testimony on the amount of the damages claimants have sustained and to determine the amount thereof. It is further ordered that this cause be and is hereby referred back to the said Samuel C. Lipscomb, Esquire, duly appointed commissioner herein, to take further proof that may be offered as to the amount of damages sustained by every and all of the claimants herein and report thereon to this court with the evidence taken before him with respect to the various claims for death and with his opinion in addition as respects the amount of the damages, etc." (R. 49-50).

The trial court reviewed the evidence and after full consideration of the report, overruled all of the exceptions and adopted the findings of the commissioner as the

court's findings and in each instance approved and adopted the amount of the damages assessed and recommended by the commissioner (R. 391-395).

In the circumstances above detailed, the findings of fact and the assessment of damages by the commissioner, duly approved by the trial court, are conclusive, because all findings were amply supported by the evidence, in which there is not to be found any substantial dispute, and none was pointed out or adverted to by the Circuit Court.

In *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 239, the Supreme Court laid down the rule specifically applicable to the facts at bar, in the following language:

> "As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Revised Statutes, Section 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. *Wiscart* v. *Dauchy*, 3 Wall. 321; *Bond* v. *Brown*, 12 How. 254; *Graham* v. *Bayne*, 18 How. 60, 62; *Norris* v. *Jackson*, 9 Wall. 125; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 249; *The Abbotsford*, 98 U. S. 440.

"The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in *Kimberly* v. *Arms*, 129 U. S. 512, 9 Sup. Ct. 355, in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet, where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court. 'Its findings,' said the court, 'like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed, under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.' As the reference in this case was by consent to find the facts, we think the rule in Kimberly v. Arms applies, and, as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive. To same effect are *Crawford* v. *Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759; *Furrer* v. *Ferris*, 145 U. S. 132, 12 Sup. Ct. 821."

In *The Eastland* (CCA 7), 78 F. (2d) 984-988, the Seventh Circuit aptly states the same rule as follows:

> "Many of the objections which are here raised by appellants relate to the sufficiency of the evidence to support the findings of fact which were made by the commissioner and affirmed by the District Court. The rule has been too frequently stated to require repetition here, that where the special commissioner or master has heard and seen the witnesses and examined all of the exhibits and the court has affirmed the findings of the commissioner or master, their findings of fact are conclusive upon this court upon appeal, if there is any substantial evidence to support them." Citing various well-considered cases.

In *The June Ames* (CCA 2), 66 F. (2d) 415, the Second Circuit follows and states the same rule:

> "As to the damages for repairs, we are not disposed to interfere. The issue depended upon whom to believe and the commissioner's finding in such a case, certainly when confirmed by the judge, is conclusive. This seems a hard lesson for the Bar to learn, but we will not slacken our rule regarding it."

This lesson seems equally difficult for some courts: *Packard* v. *Southern States Power Company* (CCA 5), 46 F. (2d) 789. In this case Judge Foster, who also wrote the opinion in the case at bar, applied the general rule above stated and refused to review the evidence.

POINT THREE.

In holding that, as a matter of fact, notwithstanding all of the evidence to the contrary, the families would have received only one-half of the money salaries being earned by the decedents, the court below violated the fundamental principle that judgments must be based upon the evidence and not upon mere conjecture.

(Based on reasons for allowance of writ and assigned error No. 4.)

The wives all testified that the checks for the salary of the respective husbands were delivered to them and that all of the money was used for the benefit of the family, except from ten dollars ($10.00) to fifteen dollars ($15.00) of it, which was used by the husband as a necessary personal expenditure (Ora Kenney, R. 53; Sophia Brennan, R. 75; Mrs. Durio, R. 110; Mrs. Pyle, R. 98).

Ball, president and general manager of Sabine Towing Company, testified as an expert on the point that, in his opinion, it would require at least twenty-five dollars ($25.00) a month to cover the necessary personal expenditures of each member of the crew (R. 309).

The above constituted all of the testimony, either direct or circumstantial, bearing on this fact issue, which the commissioner found in accord with Ball's testimony, that it would require at least twenty-five dollars ($25.00) a month as the personal expenditures for those that were not officers and slightly more for the officers (R. 344-345).

The amounts of money actually earned as salaries by the husbands and paid over by the company to their

respective families were not in dispute, nor the fact that these money salaries were over and above the value of the board and room also received by the members of the crew as part of their salaries. These undisputed money salaries were the amounts used by Mitchell in his calculation, as shown by the tabulation set out in the petition at page 7; and as also shown in the "Tabulation of earnings of members of the crew tug Edgar F. Coney, etc.," same being a copy of the records of the company (R. 319).

Notwithstanding this undisputed evidence, and the fact findings by the commissioner and the adoption and approval thereof by the trial court, the Circuit Court, without any evidence, found this fact as follows:

> "We consider it to be a fair estimate to say the family had lost an amount equivalent to one-half of what the husband and father earned" (R. 450).

The court neither cites nor discusses any evidence upon which to base such finding; and the only reason it advances for the holding is the following statement immediately preceding the holding:

> "Assuming the testimony of the widows to be truthful, it is beyond dispute that the husbands, upright, faithful and devoted, derived as much benefit from the upkeep and happiness of the family as did the wives" (R. 450).

In the first place, this is mere whimsical conjecture. But if it could be possibly imagined to have any reasonable application at all, it would be only during the lifetime of the husbands, but their death changes the whole

matter. After they were dead how could they derive any benefit? Their negligent deaths alone gave rise to the claims here asserted.

Too frequently has this Honorable Court found it necessary to overthrow judgments based not on evidence but on mere conjecture, as in the instant case. In *Norfolk & Western Ry. Co.* v. *Holbrook*, 235 U. S. 625, 35 S. Ct. 143, 145, the court said:

> "There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation, and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts. *Merchants Mut. Ins. Co.* v. *Baring*, 20 Wall. 159, 161, 22 L. Ed. 250, 251."

If juries are thus so strictly prohibited from basing their verdicts on speculation and conjecture, assuredly learned and responsible courts should exercise the most rigid self-restraint in the same matters; and their failure to do so calls for the exercise of this court's power of supervision. *Brooklyn Eastern Terminal* v. *United States*, 287 U. S. 170, 53 S. Ct. 103, 105.

POINT FOUR.

The rate of three and one-half per cent (3½%) was shown by the uncontroverted testimony to be the proper and reasonable rate for calculating the present worths of the money contributions, and the Circuit Court, in disregarding this testimony and using six per cent (6%), committed fundamental error.

(Based on reason for allowance of writ and specification of error No 5.)

Mitchell, the actuary, stated that he "considered three and one-half per cent (3½%) to be a reasonable and correct rate, under the circumstances" (R. 181). He based this opinion on the fact that the large companies of New York and of the east generally proceeded on a basis of three per cent (3%) for calculating annuities and that the large mid-continent insurance companies were on a basis of three and one-half per cent (3½%) (R. 181); and that this meant the business of said companies was organized on the theory that by reason of their extensive and varied investments, they would obtain an average return of from three to three and one-half per cent.

Mitchell also testified, without any dispute in the evidence, that the present worths of the money contributions to the families, as calculated for the periods of the respective joint life expectancies, would be the present worths of said amounts if they had been paid at the date of the deaths, to-wit, the 28th day of January, 1930; but that it was necessary, in view of the delay in payment to calculate the interest on said amounts arrived at, as

shown in his tabulation in the petition from the date of the deaths up to the date of the actual payment or up to the date he was making the calculation, which was a period of approximately five years from the date of the deaths; also, that this interest should be calculated at the same rate as used in calculating the present worths (R. 181-185).

The reason why it was necessary for the actuary to add interest for five years to the present worths is that in calculating those present worths it must necessarily be assumed that they are to be paid immediately on the death of the husband; but at the time he was making these calculations five years had already passed and now it has been nearly seven years. This takes seven years off the life of each beneficiary and it can be neither replaced nor recalled. If only the present worths, without adding the interest for the delayed period, were allowed the petitioners, each one of them will lose approximately seven years' contributions to which they were entitled, because each one will die, in all probability, in accordance with the calculated joint life expectancy, and whether they purchase an annuity or whether they put the money in the bank at interest, they lose absolutely the contributions for the delayed period. But adding this interest must not be confused and identified with allowing interest on a judgment, because there is no legal nor logical relation between them.

Not one of these petitioners has had any experience in investing money; and each is ignorant of the dangers of losing both interest and investment. Certainly those inexperienced, such as are the beneficiaries here, could

not safely loan their money at a greater rate of interest than the standard insurance companies throughout the United States, and the undisputed evidence shows that such companies make their investments and calculations on the basis that they are to receive three and one-half per cent (3½%) interest in the mid-continent and three per cent (3%) in the east.

The Circuit Court brushed aside the undisputed evidence showing that three and one-half per cent (3½%) rate should be used in calculating the present worths and again indulged in pure conjecture, itself bringing into the record by its own testimony not a few facts wholly immaterial to any issue, such as: "The legal rate of interest in Texas is ten per cent (10%) per annum. Doubtless many well secured loans are made at that rate. United States bonds as a rule do not pay more than three per cent (3%), but there are many state bonds and sound industrial securities that pay at least six per cent (6%) per annum interest. Courts are not bound to adopt either the highest or the lowest rate of interest in determining the amount to be awarded" (court's opinion, R. 449).

The record in this case does not permit such indulgent speculation by the court as to the facts. The record itself shows the facts underlying this issue and there is no evidence whatever to support or justify these conjectures by the court.

In *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 36 S. Ct. 630 at 632, the Supreme Court discussed and laid down, or at least clearly suggested, the principles

underlying this identical matter, using the following language:

> "Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available. * * * But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award. We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return."

The foregoing is authority for the proposition that the rate of interest to be used in calculating the present worth of money depends upon the circumstances of each particular case, and, therefore, upon the evidence of the record relating to the issue. In the case at bar, the evi-

dence shows no financial experience and skill on the part of the beneficiaries in making investments, and the rate to be used should be such at which these inexperienced people can make safe and liquid investments. The basic theory underlying the present worth of money is that not only all of the actual or monthly interest, but also a part of the principal will be consumed each year and that at the expiration of the joint life expectancy both principal and interest will be completely exhausted (Mitchell, R. 182).

The only testimony adduced by the Sabine Towing Company was through its witness, Weatherall, and the substance of his testimony is as follows: That if the investment must be both safe and liquid, usually only a low rate of interest can be obtained; that government bonds being not only safe but liquid bear a low rate of interest; that the next class would be municipal bonds not so liquid as government bonds, but would earn a larger rate, then would come the listed bonds not so safe, bearing a still higher rate (R. 337).

On cross examination he testified that fifteen year government bonds bearing three per cent (3%) could be obtained, but that short term bonds, or one year bonds, would earn only about one-half of one per cent, and the five or ten year bond, one per cent (1%); that his bank would pay two per cent (2%) on savings deposited, and that the banks had paid as much as three per cent (3%) on savings (R. 339); that his bank would pay only two per cent (2%) on five thousand dollars ($5,000.00) and

above that only one per cent (1%) (R. 339). He stated that money could be safely invested over a long period of time at the rate of about five per cent (5%), but municipal bonds have gradually been growing less and that municipal and independent school district bonds probably pay about four and three-fourths per cent (4¾%) (R. 337-338).

Government savings bonds, if kept for a period of ten years, pay two and nine-tenths per cent (2.9%), but it would be impossible for these people to invest any substantial part of their money in such bonds, because they must be constantly using not only the interest but a part of the principal. There is now scarcely an investment that would be considered both safe and liquid—that is, where part of the principal could be obtained at any time—that will pay as much as three per cent (3%).

The difficult conditions of both sound and liquid investments are well stated in *Hines* v. *Mills*, 218 S. W. 777 (writ of certiorari denied by Supreme Court of the United States, 41 S. Ct. 447), in which the Texarkana Court of Civil Appeals of Texas said:

> "The argument is made that $40,000.00 loaned at eight per cent interest yields a return greater than the entire income Mills was receiving at the time of his death or had any prospect of receiving by virtue of future promotion, but the rule applied in the argument above referred to is not, for a different reason, a safe guide. It is by no means certain that the amount recovered by this judgment can be con-

> stantly loaned so as to yield eight per cent interest annually and upon a security which involves no risk of loss of any part of the principal. Assuming that eight per cent is the usual rate of interest at which money is loaned we cannot overlook the fact that such loans involve more or less a hazard, which sometimes causes a loss of part or all of the principal loan. Investments which are considered absolutely safe yield a much lower rate of interest than four per cent per annum."

The foregoing, we think, proves conclusively from the record that Mitchell's opinion that three and one-half per cent (3½%) was the reasonable rate is correct and that the lower court's arbitrary use of six per cent (6%) would be wrong, even if there was some evidence to support the assumption. The looseness and abandon with which the lower court handled the record facts is shown by the following excerpt from the opinion:

> "Claimants offered an insurance actuary as a witness. He testified as to the joint expectation of life of the deceased and beneficiary. Since there is no evidence in the record to the contrary, we must accept that testimony as part of a reasonable basis for the determination of the amount to be awarded in each case" (R. 448-449).

Then the court proceeded to use six per cent (6%), in total disregard of the actuary's testimony to the contrary.

Brooklyn Eastern District Terminal v. *United States,* 287 U. S. 170, 53 S. Ct. 103, 105.

POINT FIVE.

If the evidence shows that the parents are qualified, as it does in the case at bar, the pecuniary value of the nurture and loss of intellectual, moral and physical training of the children should be estimated, as a matter of law, from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00); and this is a separate and distinct item from the present worth of the money contributions, and should not be subtracted from but allowed over and above the present worths.

(Based on reasons for allowance of writ and specifications of assigned errors Nos. 6 and 7.)

The parents were all shown by the undisputed evidence to be home-loving, attentive and kind to their wives and children. This fact was expressly recognized and found by the commissioner, the lower court and by the Circuit Court; the latter court describing them as "upright, faithful and devoted" (R. 450).

Sophia Brennan and her husband had three children, ages eight, six and three, respectively, and she testified that her husband was always talking to his children, teaching them to do the right thing, always correcting them; that he loved and was unusually affectionate toward them and that his whole heart and soul were wrapped up in them (R. 6-7).

Ora Kenney and her husband had two children, ages ten and six, and she testified that her husband was an ideal father, had high ambition for his children, expected to educate them and make them law-abiding citizens; that

he associated with them all the time that he was off work and that he and the children were very affectionate toward one another (R. [illegible]).

Mrs. Adolphine Durio and her husband had six children, three of them being minors at the time of the father's death, of the ages sixteen, thirteen and nine, respectively, and she testified that her husband associated with and loved his children, and undertook to teach them the difference between right and wrong, was always with them when he was off duty and he was working for his children to send them to school and to educate them. (R. 110).

The evidence further shows that in the midst even of the depression they were not only kept in their employment, but their salaries were being raised. Ball, the president and manager of the company testified that they were unusually capable, sober and dependable men. The evidence shows that Brennan, Kenney and Pyle had been in the employ of the company for several years and were all along being promoted; that they had survived the disasters of the depression, probably on the principle of the survival of the fittest, and had been employed continuously and were even being promoted throughout the depression. In fact, the record leaves no doubt that these fathers were much above the average of their class and both disposed and fit to bring up their children properly and that the children have been actually deprived of such advantages.

In *Chicago C. R. Co.* v. *Vreeland*, 227 U. S. 58, 57 L. Ed. 417 at 423, the Supreme Court has expressly recognized the value of the parental nurture and care of the child by the parent, whether father or mother, "if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages."

In *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404, the Second Circuit, after stating that "the commissioner might take into account the pecuniary value of the nurture of the child and allow for its loss of intellectual, moral and physical training," held that an allowance for a minor, in addition to the present value of the decedent's contributions to the family, in the sum of four thousand five hundred forty dollars ($4,540.00) was reasonable and not excessive.

In 74 American Law Reports at pages 95 and 103 the rule is stated (page 103) as follows:

> "In this connection, it is interesting to note that the court in *Southwest Power Company* v. *Price* (1929), 180 Ark. 567, 22 S. W. (2d) 373, 218 U. S. 703, 74 L. Ed. 1128, 50 S. Ct. 253, 281 U. S. 753, 74 L. Ed. 763, 50 S. Ct. 407, held that a verdict of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) would not be excessive compensation for loss of parental love, care and training.
>
> "In this case the Supreme Court of Arkansas, in affirming this verdict for thirty thousand dollars ($30,000.00) at page 376 said:
>
> > 'It is said that the verdict is excessive and while it is a very substantial sum, we have reached the conclusion that we cannot say, as a matter of law, that it is excessive. It is a matter

> of simple arithmetic to determine that the present value of an annuity of thirteen hundred eighty dollars ($1380.00) held for a period of forty (40) years would be a sum in excess of twenty-seven thousand dollars ($27,000.00), depending upon the rate of interest, and in addition to the pecuniary loss sustained by the widow and child, the child is entitled to a reasonable sum for the loss of parental love, care and training. The verdict was for a gross sum and we cannot tell how much was awarded for pecuniary loss and how much for parental care, but it certainly could not be said that a judgment of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) for this purpose would be excessive.' "

As a matter of law, the commissioner, the trial court and the Circuit Court all erred in this respect: First, in not awarding each of the minors a sum of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) for this particular loss and awarding it as a separate and distinct item of itself over and above the present worth of the money contributions; second, in deducting whatever award was made for this item in each case from the present worth of the money contribution.

As demonstrating beyond any doubt that they did not award the children any separate amount for the loss of parental education, moral training, nurture, etc., we direct the court's attention to the fact that Bertha M. Pyle, who had no children was awarded twenty thousand dollars ($20,000.00), and they awarded Sophia Brennan and her three minor children twenty-one thousand dollars ($21,000.00); each of these awards being practically one-half of the calculated present worths of the money

contributions. The present worths of the Brennan and Pyle claims were substantially the same, resulting from the facts that the joint life expectancy in the first was twenty-four years and in the second twenty-five years, although the money contributions to the family were slightly different, being one hundred seventy-five dollars ($175.00) in the Brennan claim and one hundred sixty-five dollars ($165.00) in the Pyle claim.

POINT SIX.

In the Causey claim the father's common-law right to the earnings of his child during minority did not enter into nor become a part of the award made to the father and mother. The evidence shows that the present worth of the minor's actual money contributions of twenty dollars ($20.00) a month during the joint life expectancy was the sum of three thousand four hundred thirty-one and 15/100 ($3,431.15) dollars (R. 215).

(Based on reason for allowance of writ and specification of error No. 8.)

The commissioner's explanation of the basis upon which he made the award in this claim shows affirmatively that the parents' common-law right to the wages of the minor child did not enter into nor become a part of the amount of three thousand dollars ($3,000.00) that he found, as shown by his statement, as follows:

> "The father was infirm. The boy was bright and intelligent and showed an affectionate regard for his parents, and it is but natural to assume that he would have been of material assistance to them, regardless of any legal obligation for their support.

Taking into consideration his natural affection, his prospects of future advancements and personal service he might render to his aged parents in their declining years, the award in this case is fixed at three thousand dollars ($3,000.00)" (R. 352).

POINT SEVEN.

When the commissioner determined and assessed the amount of the awards the damages became liquidated, subject only to the District Court's approval, and the trial court acted clearly within its reasonable and discretionary powers in finding as a fact, under all the circumstances, that interest should run, and in decreeing that it should run, from the date of the filing of the commissioner's report.

(Based on reasons for allowance of writ and specification of assigned errors Nos. 9 and 10.)

The Circuit Court reversed and rendered this part of the decree in the following language:

> "The judgment awarded interest to the claimants at the rate of six per cent per annum from February 28, 1935, the date of the filing the commissioner's report. The report merely recommended the amounts to be awarded and did not fix the liability of the company. The act does not provide for interest before the damages are determined. *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526. In admiralty the allowance of interest is discretionary with the court. In this case interest should be allowed at the rate of six per cent per annum from July 18, 1935, the date the decree was entered in the District Court" (R. 455).

The court thus expressly recognizes the rule that "in admiralty the allowance of interest is discretionary

with the court;" but it erroneously construes the rule as meaning that this "discretionary power" is exclusively in the Circuit Court.

Also, we think the court below erred in holding that the effect of the commissioner's report was merely to recommend the amounts to be awarded and did not fix the liability of the company, as being unnecessarily restrictive in construing the statutes involved, which contain nothing to indicate that interests should not be awarded in any case, regardless of circumstances, from the date of the filing of the commissioner's report.

The assessment of the damages by the commissioner fixes and liquidates the amounts subject only to the approval of the District Court, which usually follows as a matter of course and of mere technical procedure.

The respondent here attempted to assign error to this action of the trial court; but the assignment is insufficient because it fails to show abuse of the court's discretion. The said assignment was designated "Tenth" and was of the tenor following:

> "The court erred in allowing interest on damages from date of the commissioner's report" (R. 406).

The courts have uniformly held that it is within the discretion of the court to allow interest from the time that the claim has been liquidated; also, that a claim is liquidated at the time the commissioner's report is filed with the court, and that an abuse of discretion must be shown, and no abuse of discretion is alleged in the above assignment of error.

In *Union Steamboat Company* v. *Chaffins' Administrator* (CCA 7), 204 F. 412, 420, the court says:

> "From the cases examined, we are of opinion that, under the circumstances of this case, the trial judge did not abuse the discretion vested in him in allowing interest from the time when the report was completed. By the decision of the District Court the finding of the commissioner as to the amount of the several claims was approved. It thus appeared that the amounts found by the commissioner were correct and were liquidated for all purposes of the present inquiry."

In support of the above statement the court cited several cases from the Circuit Court of Appeals and from the Supreme Court on allowance of interest under similar circumstances. This case has been approved and followed on the allowance of interest in *Chicago, D. G. & B. Transportation Company* v. *Moore* (CCA 6), 259 F. 490, 507; *Union Steamboat Company* v. *Fitzgibbon,* (CCA 7) 261 F. 768; *The Argo,* (CCA 9) 210 F. 872.

The court below cites as supporting its holding, *Cortes* v. *Baltimore Insular Line,* (CCA 2) 66 F. (2d) 526. This case holds the judgment in that case "was erroneous in including interest on the verdict from the date of death," and that "neither the Jones Act nor the Federal Employers' Liability Act (45 U.S.C.A., Sections 51-59) permits the awarding of interest before the damages are judicially ascertained." Citing several cases, among them being *Chicago, M. St. P. & P. R. Co.* v. *Busby,* (CCA 9) 41 F. (2d) 617, involving injuries to a railroad employee, wherein the court cited *Chesapeake & Ohio Ry. Co.* v.

Kelly, 241 U. S. 485, 33 Sup. Ct. 630, 60 L. Ed. 1117, and quoted from the latter case the following:

> "But the question on proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the federal courts."

Then the court in the Busby case continues:

> "Treating the question, then, as one of general law, our own decisions are controlling. In *Burrows* v. *Lownsdale* (CCA), 133 F. 250, and *The Argo* (CCA), 210 F. 872, it was held that the interest is not allowable on claims of personal injuries until the amount of damages has been judicially ascertained, distinguishing such cases from actions for loss of or injuries to property."

It is neither clear nor convincing upon any sound principle that property should be regarded (if it is) by the courts as more important or sacred than human life. In both the damages are, as a rule, equally unliquidated until judicially determined.

The Argo, supra, holds that the damages are liquidated upon the assessment thereof by the commissioner on the filing of the report.

In *La Bourgogne* (*Deslions* v. *La Compagnie, etc.*) 210 U. S. 95, 28 S. Ct. 664, 673, 52 L. Ed. 973, 986, there was judgment for loss of property as baggage, and interest was allowed from date of collision and sinking of the ship.

The foregoing cases present a sharp conflict on this issue and it is a matter that should be definitely settled

by this Honorable Court. There is nothing in these statutes to indicate that they should not have a sufficiently liberal construction to permit the running of interest either from the date of the personal injury, or death, or the filing of the commissioner's report assessing damages; and there is no sound reason why the same rule should not apply equally to injury to the person and damage to property. Liberal construction requires the putting aside of purely technical distinctions between the words "liquidated" and "unliquidated."

POINT EIGHT.

In view of the undisputed elements entering into the calculations of the present worths of the money contributions in the case at bar, the commissioner and both lower courts were required, as a matter of law, to determine the compensatory damages sustained in each case in accordance with this mathematical evidence as being the most accurate and trustworthy criterion.

(Based on reason for allowance of writ and specification of assigned error No. 11.)

It has been heretofore shown by citations from the record that all of the necessary and appropriate elements entering into the present worth calculations by the actuary, Mitchell, were established by the uncontroverted evidence; and this being so, the courts below should have followed unflinchingly the mathematical results as being the best and most accurate evidence of the extent of the damages suffered and of the compensation con-

templated and provided by the statute. In such undisputed circumstances, the said respective present worths absolutely and accurately determined the amounts that should be awarded by the courts.

Both the commissioner and the trial court found the facts and actually calculated the present worths and properly used the three and one-half per cent (3½%) rate in making the calculations in accordance with Mitchell's undisputed testimony, and also used all of the other undisputed elements in calculating the present worths such as the earnings of decedents and contributions to their families, the ages and joint life expectancies (commissioner's fact findings, R. 348-352; trial court's identical fact findings, R. 391-395). These unquestionably constituted fact findings in accordance with Admiralty Rules 43½ and 46½ and in harmony with the construction of these rules in *The Vallescura*, 293 U. S. 296, 55 S. Ct. 194, 195.

Notwithstanding both the commissioner and the trial court found the facts as aforesaid and properly calculated the present worths of the money contributions to the families, they balked at following this mathematical evidence to its logical conclusion; but, on the contrary, cut all of the higher present worths by substantially half, without any evidence to justify such reductions, and all of the reasons suggested by the commissioner as an excuse for such drastic cuts of the present worths are clearly whimsical and arbitrary, as specifically pointed out in "Claimants' Exceptions and Objections to the Report of the Commissioner" (R. 360 to 389), all of which were overruled by the trial court (R. 391).

In *Chesapeake & Ohio R. Co.* v. *Kelly, supra,* this court, with respect to this identical point, said:

> "*Where future payments are to be anticipated and capitalized in a verdict that plaintiff is entitled to no more than their present worth is commonly recognized in the state courts*" (36 S. Ct. 633).

In support of this, many cases by various state courts are cited.

The quotation above states that no more than the present worth is commonly recognized; and conversely, it necessarily follows that no less than the present worth is allowed. As a matter of fact, apparently all of the decided cases have uniformly held that at least the present worth of the money contribution should be awarded.

In *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404, damages were allowed to the full amount of the calculated present worth of the money contribution, with additional allowance of $4540.00 to the child for loss of parental nurture, care and training, etc.

The following cases further illustrate that the courts have usually followed this principle in allowing and estimating damages:

Clyde Steamship Co. (D. C.), 16 F. (2d) 930 (affd. 18 F. (2d) 1015, certiorari denied, 48 Sup. Ct. 21); *The Columbia* (D. C.), 25 F. (2d) 516 (affd. 25 F. (2d) 518, certiorari denied 48 Sup. Ct. 530); *Drowne* v. *Great Lakes Transportation Co.* (CCA 2), 5 F. (2d) 59; *United States* v. *Boykin* (CCA 5), 49 F. (2d) 762.

In the Boykin case, last cited, *supra,* the Circuit Court for the Fifth Circuit followed the same rule and method in estimating the damages as being the calculated present worth of the money contribution, and reduced the judgment to harmonize with that amount.

In the case at bar the commissioner, with respect to the claims involving the larger damages, cut the present worths substantially one-half, and then deducted from the one-half allowed, the awards to the minors. Then the Circuit Court, apparently vying with the commissioner, again cut by one-third or more the awards made by the commissioner in the larger cases, and reduced practically all the other allowances by more than one-half. All these cuts from the present worths, both by the commissioner and by the Circuit Court, were made without any substantial reason or basis and against all the evidence. The contention here made by the petitioners that the awards in each instance should have been the amount representing the present worth, and that this Honorable Court should so find, is not at all inconsistent with the principle that, in the circumstances shown, the awards made by the commissioner and approved by the District Court were absolutely conclusive upon the Circuit Court to the extent of the amounts actually awarded, that is, that the said awards should not be reduced, but that they should be increased so as to harmonize with the present worths in each case as shown by the evidence, for the simple reason that the said present worths were calculated and accurately shown in accordance with the undisputed testimony.

In *The Spokane* (CCA 2), 294 F. 243, 247, the Circuit Court adverted to the loss of wages and money contribution up to the time of the entry of judgment as being a proper consideration in the measure of damages. Using even the unwarranted basis of one-half of the monthly salary of each decedent, the petitioners have lost at the date of the judgment in the Circuit Court of Appeals the following amounts:

Sophia Brennan and her three minor children, $7,800.00; Bertha M. Pyle, $7,410.00; Adolphine Durio and her three minor children, $3,315.00; R. J. Causey, $650.00; Ora Kenney and her two minor children, $6,435.00; Ruth Nelson, $1560.00; and Ruth Anderson, $2,535.00.

Therefore, even under the Circuit Court's baseless calculations, petitioners have already lost more than one-half of the respective amounts awarded them; and in most cases, with more than two-thirds of the life expectancy yet to come.

SUMMARY.

Brooklyn Eastern District Terminal v. *United States*, 287 U. S. 170, 53 S. Ct. 103, 105, is peculiarly applicable to the case at bar with respect to the rule stated as to the use of an extravagant criterion for the measure of damages:

> "A wide range of judgment is conceded to the triers of the facts in the choice of the standard to be applied and in the method of applying it. The choice, however, may not be arbitrary, nor is the range of judgment without limit. We think that on the face of this award there is declared a principle of assessment that in the setting of the circumstances exceeds

> the bounds of any discretion allowed to the assessors. * * * An assessment of damages may be corrected if erroneous in point of law, but also it may be corrected if extravagant in fact."

"Extravagant," in its radical and literal sense, meaning wandering from proper and reasonable bounds *in any direction,* comprehends as well the idea of inadequacy as of excessiveness. In that case the court was considering excessive damages; but in the instant case, palpable inadequacy should also have this Honorable Court's equally careful consideration. The Circuit Court, against all of the evidence, cut in half all of the larger allowances, which had already been reduced by the commissioner and the trial court to one-half of the present worths. *As claimants pointed out in their exceptions, the commissioner had assigned for his action purely whimsical and arbitrary reasons and having no basis in the evidence before him; but the Circuit Court acted on its apparently declared policy with respect to all such cases, that in all cases, as a matter of fact and of law, the families would receive and were entitled to only one-half of the decedent's earnings, regardless of any evidence; that six per cent (6%) was the proper rate to use regardless of any evidence to the contrary; that the present worth should be calculated on the said arbitrary findings of that court, regardless of record evidence; and that in calculating the present worths, the petitioners are to be charged with and made to pay interest for the money that they have not received for a period of seven years, and that the respondent is to be credited with and receive benefit of interest on the money that it has been wrongfully withholding and using for seven years. All of this is extravagant and erroneous in the extreme, both in fact and in law, and should be corrected.*

CONCLUSION.

It is greatly to be desired that there should be at least reasonable and comparative "uniformity of decision" throughout the United States, and in the several Circuits, with respect to amounts allowed, under these statutes, to seamen and their families under substantially the same facts. To accomplish this, the courts must rigidly apply uniform principles both of statutory construction, and of damage calculations.

In *La Bourgogne* (*Deslions* v. *La Compagnie, etc.*), *supra*, this Honorable Court clearly pointed out the unfairness and impolicy of construing the Limitation of Liability Act with a "tight and grudging hand," as against ship owners; and what was there said is not less pertinent to the construction of the federal acts now under consideration that were enacted for the benefit of seamen.

In *The Arizona* v. *Anelich*, 56 S. Ct. 707, this court definitely laid down the true principle for the guidance of all our courts:

> "The legislation (the Jones Act) was remedial for the benefit and protection of seamen who were peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. * * * Its provisions, like the Merchant Marine Act, of which it is a part, are to be liberally construed to obtain that end * * *, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an established part."

This principle of liberal construction by this court has been uniform, as distinctly appears in the following cases:

Beadle v. *Spencer* (decided April 27, 1936), 56 S. Ct. 712; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375, 53 S. Ct. 173, 77 L. Ed. 368; *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Alpha S. S. Corp.* v. *Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; *Warner* v. *Goltra*, 293 U. S. 155, 157, 160, 55 S. Ct. 46, 79 L. Ed. 254.

English courts recognize, and have commented upon, the difference "between damages granted with a liberal and with a sparing hand." *Emblen* v. *Myers*, English 6 H. & H. 54, 158 Reprint 53.

The hand we are here condemning was "tight and grudging," "sparing" and stingy—verily, the disguised hand of Jacob.

To enforce reasonable "uniformity of decision" in these matters, and to obtain comparative results in damage awards, it would seem not merely appropriate but necessary that this Honorable Court constantly exercise its supervisory authority; and we think the case at bar should have your serious and favorable consideration, toward the attainment of these just ends.

Respectfully submitted,

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APPENDIX.

Merchant Marine Act, Sec. 33.

Section 33 of the Merchant Marine Act of 1920 (46 U.S.C.A., Section 688) referred to herein as the Jones Act, reads as follows:

> "Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Section 20, 38 Stat. 1185; June 5, 1920, c. 250, Section 33, 41 Stat. 1007.)"

Employers' Liability Act.

Employers' Liability Act, 45 U.S.C.A., Section 51, made applicable in case of death of seamen by the Jones Act, is as follows:

> "Liability of common carriers by railroad, in interstate or foreign commerce, injuries to employees

from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65.)"

New Admiralty Rule 43½.

28 U.S.C.A., Section 723:

Rule 43½. Report of Commissioners; Presumption as to Correctness; Review.

In all references to commissioners or assessors, by consent or otherwise, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the commissioners or assessors shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same

in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: Provided, that when a case or any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the commissioners or assessors or arbitrators, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator.

(This is a new rule promulgated May 31, 1932.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 460.

CHARLES VAN BEECK, ADMINISTRATOR, ETC., PETITIONER,

VS.

SABINE TOWING COMPANY, INC., ET AL.

BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 460.

CHARLES VAN BEECK, ADMINISTRATOR, ETC., PETITIONER,

VS.

SABINE TOWING COMPANY, INC., ET AL.

BRIEF OF PETITIONER

On Writ of Certiorari Filed October 12, 1936.

Certiorari Granted November 16, 1936.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Comes now the Petitioner, Charles Van Beeck, Administrator of the estate of Edward C. Van Beeck, deceased, and files in this cause his brief wherein he has separated the issues in this cause from those involved

in the petition in cause No. 459, Brennan, Administratrix, vs. Sabine Towing Company, Inc., and which were presented together in the original application for certiorari.

PRELIMINARY STATEMENT.

The proceedings in which this writ was granted were begun in the United States District Court for the Eastern District of Texas at Beaumont, Texas, on June 27th, 1930. A libel was filed by the Sabine Towing Company, Inc., owner of the steam towboat "EDGAR F. COXEY" in a cause of exoneration from or limitation of liability. Said towboat sank with all on board on January 27, 1930. Certain suits were filed in the State Courts on account of the negligent drowning of members of the crew of said vessel, and thereupon this proceeding was instituted (R. 1-6).

Claims were filed in the limitation proceedings by personal representatives of several members of the crew and among them was the claim of Mrs. Jennie Royakers suing as administratrix of the estate of Edward C. Van Beeck, her son (R. 7-13).

On the 17th day of June, 1930, the District Court rendered an interlocutory decree wherein it was adjudged that the petitioner was not entitled to exemption from liability and its prayer for exoneration from or limitation of liability was denied. It was further adjudged that the claimants were entitled to all damages

that had accrued to them by reason of the sinking of said vessel, and the question of damages was referred to Samuel C. Lipscomb, Esq., as Commissioner, to assess and report his conclusions as to damages (R. 13-16).

After the interlocutory judgment was rendered, the death of Mrs. Jennie Royakers was suggested, and it was shown to the Court that Charles Van Beeck had been substituted as administrator of the estate of Edward C. Van Beeck. The Court thereupon duly substituted Charles Van Beeck in the cause as administrator in lieu of and as a substitute for Mrs. Jennie Royakers, administratrix (R. 23-24).

In the Commissioner's report the following agreement was shown:

> "It was agreed by counsel that Edward Van Beeck at the time of his death was unmarried, and that he left surviving him his mother, Mrs. Jennie Royakers, and several brothers, and that at the time of his death he was contributing to the support of his mother from $30.00 to $50.00 per month. It was further agreed that his mother died on July 31st, 1931, and that at the time of her death she was fifty-eight years of age. The pecuniary loss is limited to the duration and extent of the lifetime of the mother (*Snider* v. *G. E. Co.* (N. Y.), 34 A. L. R. 158) (fols. 353-359). The award in this case is fixed at $700.00" (R. 22-23).

The District Court made the same finding as the Commissioner (R. 24-25). The final decree awarded damages to all claims except to Charles Van Beeck, administrator, suing on behalf of the mother of Edward C. Van Beeck (R. 25-28). Error was assigned to the failure of

the trial court to make any allowance in this regard (R. 34).

The Circuit Court of Appeals for the Fifth Circuit, affirmed the action of the District Court in making no allowance to the administrator for damages which had accrued to Mrs. Jennie Royakers up to the time of her death (R. 43-44). This was assigned as error in petition herein and certiorari upon said question was granted November 16th, 1936.

POINT ONE.

The Circuit Court of Appeals erred in holding that Charles Van Beeck, Administrator, was not entitled to recover the amount of damages which had accrued from the death of the son, Edward C. Van Beeck, to the death of the mother, Mrs. Jennie Royakers, as found by the Commissioner.

There was no controversy as to the facts in regard to the damages arising as a result of the death of Edward C. Van Beeck. The District Court and the Circuit Court of Appeals, both, based their judgments, wherein they disallowed any damages on behalf of the mother of Edward C. Van Beeck, upon the case of *Chicago, Burlington & Quincy R. R. Co.* v. *Wells Dickey Trust Company*, 275 U. S. 161, 48 Sup. Ct. 73, 72 L. Ed. 216, 59 A. L. R. 758.

However, the facts of that case were entirely different from those involved here. There one Anderson was killed and shortly thereafter his mother died, before an administrator was appointed and before the filing of

any suit. Moreover, the administrator appointed later did not bring the suit for the benefit of the mother nor for her estate, but exclusively on behalf of the sister of Anderson. The state Court permitted recovery, the judgment was reversed by this Court, which held that the cause of action vested exclusively in the mother; that the statute did not give the sister a right of action, but that such right had already vested under the statute in the mother, and that, therefore, there could be no shifting not divestiture.

In that case this Court called attention to the fact that "No action was brought on her (the mother's) behalf." This Court also used this language:

> "The cause of action accrues at the death * * *. When it accrues, there is an immediate, final and absolute vesting; and the vesting is in that one of the several possible beneficiaries who, according to the express provision in the statute, is declared entitled to be compensated. Upon Anderson's death, an administrator might have been appointed and an action brought immediately. If it had been so brought, it would have been for the benefit solely of the mother; and no other action would have lain. The failure to bring the action in the mother's lifetime did not result in creating a new cause of action after her death for the benefit of the sister."

There is no such question in the case at bar, since the administratrix was appointed and brought suit and was entitled to recover for the mother the amount of benefits that it could be shown she was entitled to until the time of her death. After her death, an administrator being appointed in her name, place and stead, he had

the right to recover for the benefit of her estate such sum as she would have been entitled to recover for herself up to that time, had she lived. We are claiming only the amount of money which had accrued up to the time of the mother's death. Numerous cases have allowed such recovery.

In *Union Steamboat Company* v. *Chaffin's Administrators,* 204 Fed. 417, the Circuit Court of Appeals for the Seventh Circuit holds, quoting from a New York case, as follows:

> "The right to such damages which thus accrues became an asset of the estate of the beneficiary designated by the statute, and the death of such beneficiary does not prevent or terminate a right of action to recover damages which have thus been by him suffered." Citing *Matter of Meekin* v. *Brooklyn H. R. R. Co.,* 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635.

The New York Court of Appeals in *Sider* v. *General Electric Company,* 238 N. Y. 64, 143 N. E. 792, 34 A. L. R. 158, holds, quoting from syllabus, as follows:

> "Damages to be allowed to the widow of one killed by another's negligence, where she dies before trial of the action, are to be limited to the pecuniary loss sustained by her until her death."

In the *City of Rome,* 48 Fed. (2nd) 341, 342, the Court fully discusses this question, citing the *Union Steamboat Co.* v. *Chaffin's Administrators, supra,* and *Chicago, Burlington & Quincy R. R. Co.* v. *Wells Dickey, supra,* and other cases, and holds that the right of the

beneficiary to damages to the date of death does not abate with the death of such beneficiary, but that damages may be recovered up to the time of the death.

The case of *Martin's Administrator* v. *Baltimore & Ohio Ry. Co.*, 151 U. S. 673-703, cited by the Circuit Court of Appeals below as sustaining their decision that the petitioner was not entitled to judgment, has no applicability to the facts of this case. In the case referred to one Martin sued the railway company for damages arising from personal injuries. Upon a trial in the lower court recovery was denied. Some years later he died, while the case was on appeal to this court and it was held that an administrator could not proceed further with the case. There was no showing, so far as we can find from the record, that his death was caused from his injuries, or that there was any beneficiary entitled to recover. In fact, as above stated, he had already been denied recovery in the trial court. There is nothing in the case referred to that would have any bearing whatever upon the case now before this court. In the case at bar the lower court had given judgment in favor of all claimants except the administrator of Edward C. Van Beeck's estate and this was denied because the mother had died pending the suit.

It has been the general holding and the rule is supported by the weight of authority under statutes like the one in question, where the cause of action is *vested* in a beneficiary, that such right so accruing is not forfeited by the death of the beneficiary.

The matter has been fully discussed in *Shawnee* v. *Cheek*, 41 Okla. 227 at page 256, 51 L. R. A. (N.S.) 672, 137 Pac. 724, and Ann. Cas. 1915C, 290, wherein the Court says:

> "A recent case holding that a right of action for death under the statutes of Illinois, which do not appear materially different from our own in this respect, accrues immediately upon death, becomes an asset of the estate of the beneficiary, and survives the death of the beneficiary, is that of *Union Steamboat Co.* v. *Chaffin*, 122 C. C. A. 598, 204 Fed. 412, and in that case the case of *Pitkin* v. *New York C. & H. RR. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906, which is to the same effect, is cited and quoted."

In the same case the Court further says, quoting from *Cooper* v. *Shore Electric Co.*, 63 N. J. L. 558, 44 Atl. 633, at page 635:

> "It is also clear that the pecuniary injury to be compensated for is that of the widow or persons who are next of kin at the time of the death of the deceased, and that the cause of action created by the statute inures to such persons as a vested right. By this statute a property right is created in the beneficiary of such a nature as would give the action the quality of survivorship, and take it out of the maxim, *actio personalis moritur cum persona.*"

The following cases support the same view:

Re: Meekin, 164 N. Y. 145, 51 L. R. A. 235; *Mundt* v. *Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940; *Thomas* v. *Maysville Gas Co.*, 112 Ky. 569, 66 S. W. 398; *Pitkin* v. *New York C. & H. RR. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906; *Kentucky Utilities Co.* v. *McCarty*, 169 Ky. 38, 183 S. W. 237; *Fitzgerald* v. *Edison Electric Illumi-*

nating Co., 207 Pa. 118, 56 Atl. 350; *Frazier* v. *Georgia R. & Banking Co.*, 101 Ga. 77, 28 S. E. 662; *Quinn* v. *Moore*, 15 N. Y. 432.

The English authorities quoted in *Cooper* v. *Shore Electric Company*, 63 N. J. L. 558, 44 Atl. 633, illustrate that a statute of this character gives an entirely new cause of action to the beneficiaries.

> "It gives a new cause of action clearly, and does not merely remove the operation of the maxim, '*actio personalis moritur cum persona*,' because the action is given in substance, not to the personal representative in point of estate of the deceased man, who would naturally represent him as to all his own rights of action which would survive, but to his wife and children, no doubt suing in point of form in the name of his executor."

Those authorities further describe the right given as:

> "an action which is new in its species, new in quality, new in principle, in every way new, and which can only be brought if there is any person answering the description of widow, parent, or child, who, under such circumstances suffers pecuniary loss by the death." *Seward* v. *Vera Cruz*, 10 App. Cas. 59, 67, 70.

All statutes like the one in question giving a cause of action for injuries resulting in death are founded largely upon Lord Campbell's Act, and should be given a like construction as above.

It will be noted that this Court in passing upon the Wells Dickey Trust Company case used the following language:

> *"The cause of action accrues at the death * * *. When it accrues, there is an immediate, final and absolute vesting; and the vesting is in that one of the several possible beneficiaries who, according to the express provision in the statute is declared entitled to be compensated. Upon Anderson's death, an administrator might have been appointed and an action brought immediately."*

This Court has stated:

> "They (rights) are vested when the right of enjoyment, present or prospective, has become the property of some particular person, or persons, as a present interest." *Pearsall* v. *Gt. Northern Ry. Co.*, 161 U. S. 646, 673, 40 L. Ed. 838.

The right to maintain a suit is a vested right.

> "There is a vested right in an accrued cause of action, in a defense of a cause of action, even in the statute of limitations, when the bar has attached by which an action for debt is barred." *Lewis* v. *Penn. Ry. Co.*, 69 Atl. 821, 823, 220 Pa. 317, 18 L. R. A. (N.S.) 279, 13 Ann. Cas. 1142.

See also same definition in *Cassard* v. *Tracy*, 52 La. Ann. 835, 27 So. 368, 49 L. R. A. 272.

> "Rights are vested when the right of enjoyment, present or prospective, has become the property of some particular person or persons as a present interest." *Trustees of Presbytery of Jersey City* v. *Trustees of First Presbyterian Church of Weehawken*, 80 N. J. Law 572, 78 Atl. 207.

This suit which was for the recovery for the death of seamen was brought and maintained under Section 33 of the Merchant Marine Act of 1920, at 46 U.S.C.A., Sec-

tion 688, and usually referred to as the Jones Act. In part that Statute reads:

> "and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

The Employers' Liability Act (45 U.S.C.A., Section 51) which was embodied in the Jones Act by reference reads in part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

There is certainly nothing in either of these Acts that would warrant the suggestion that Congress intended a forfeiture of the damages accruing up to the time of the death of the beneficiary. The liberal construction which has always been given to the Jones Act would require the Court to hold that such damages so accruing are not forfeited by the death of such beneficiary.

Van Beeck was a member of the crew of the towboat "EDGAR F. CONEY" and was drowned. He was a seaman. This Court has always held that the Jones Act, which is for the benefit of seamen and their beneficiaries, should be liberally construed.

> "This Court has held that the Act (the Jones Act) is to be liberally construed in aid of its beneficent purpose to give protection to the seaman, and to those dependent on his earnings." *Cortes* v. *Baltimore Insular Line*, 77 L. Ed. 373, 287 U. S. 374-376.

This Court has also said:

> "The Jones Act has the effect of bringing into the maritime law, for the benefit of seamen, all appropriate statutes relating to employers' liability for the personal injury or death of railway employees. Both acts are to be treated as part of the maritime law. *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 389, 68 L. Ed. 748, 753, 44 S. Ct. 391. Seamen have always been regarded as wards of the admiralty and their rights, wrongs and injuries a special subject of the admiralty jurisdiction. Benedict, Admiralty, 4th Ed., Sections 182, 603. The policy of Congress as evidenced by its legislation, has been to deal with them as a favored

class. *Robertson* v. *Baldwin*, 165 U. S. 275, 287, 41 L. Ed. 715, 719, 17 S. Ct. 326. In the light of and to effectuate that policy statutes enacted for their benefit should be liberally construed." *Bainbridge* v. *Merchants & M. Transp. Co.*, 287 U. S. 280-282, 77 L. Ed. 305.

Further on the question of construction of the Jones Act, we call attention to the fact that this Court has felt called upon to show their liberality, and that they consider seamen and their beneficiaries as "wards of the Court" in the following cases: *The Arizona* v. *Anelich*, 298 U. S. 110, 80 L. Ed. 1075; *Beadle* v. *Spencer*, 298 U. S. 124, 80 L. Ed. 1082; *Jamison* v. *Encarnacion*, 281 U. S. 635, 74 L. Ed. 1082; *Alpha Steamship Corporation* v. *Kane*, 281 U. S. 642, 74 L. Ed. 1086; *Warner* v. *Goltra*, 293 U. S. 155, 79 L. Ed. 254.

Certainly the decision below, if allowed as a precedent, would have the effect of destroying from their inception those causes of action that have vested by operation of the statute, and would abate them immediately upon the death of the beneficiaries. Likewise it would result inevitably that, because of the prolonged delays peculiar to this class of litigation, not a few of such claims would be automatically settled by death, to the profit of the wrongdoer. Liberality of construction would not permit such result. The Seventh Circuit in *Union Steamboat Company* v. *Chaffin's Administrators*, *supra*, has already liberally construed a similar statute.

It is our view that this Court in *Chicago, Burlington & Quincy R. R. Co.* v. *Wells Dickey Trust Co.*,

supra, has in effect held that the surviving beneficiary's right is not subject to defeasance for damages accruing up to the time of the death of the beneficiary, since this Court has held that the right is a vested one, and therefore not subject to forfeiture. In any event, a liberal view, and one sustained by the great weight of authority, is that the administrator herein is entitled to recover the damages suffered by Mrs. Royakers up to the time of her death.

We therefore pray that the judgment of the District Court and of the Circuit Court of Appeals be reversed and that judgment be here and now entered for such damages as are shown by the stipulation on file, or in the alternative that this cause be remanded for the entry below of such judgment as should have been rendered upon the original hearings of this cause.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936

No. 459

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
Petitioner,

versus

SABINE TOWING COMPANY, INC., ET ALS.,
Respondent,

No. 460

CHARLES VAN BEECK, ADMINISTRATOR,
Petitioner,

versus

SABINE TOWING COMPANY, INC., ET ALS.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI IN CAUSES NUMBERED 459, and 460.

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CHARLES VAN BEECK, ADMINISTRATOR,
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI IN CAUSES NUMBERED 459, and 460.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Fifth Circuit, is found at R. 447-455, but not yet reported. The decree of the District Court is found at R. 396. The Commissioner's report and findings are to be found at R. 341-353. The trial Court's modification and adoption of the findings of the Commissioner as its findings is found at R. 391-396.

STATEMENT

In one petition petitioners herein are seeking writs of *certiorari* in causes Numbered 459 and 460. In cause Number 459 petitioners are complaining of, and seeking to have this Court review, the action of the United States Circuit Court of Appeals for the Fifth Circuit, on appeal in Admiralty, a trial *de novo*, in fixing the awards for damages herein in a sum below that arrived at in the District Court, to cover pecuniary damages sustained by petitioners, growing out of the death of seamen, and as allowed under Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. Section 688); and of the action of the Appellate Court in further modifying the final decree of the lower Court by providing that interest on damages should run from the date of the final decree in the District Court, instead of from date of the Commissioner's report herein, as allowed by the Commissioner and the District Court.

In cause Number 460 petitioner is complaining of the action of the two lower Courts in disallowing a claim for damages in the sum of Seven Hundred Dollars ($700.00), which the Commissioner allowed to the administrator of a death claimant who, after having instituted her suit, died before the question of liability was determined.

In this brief and under Part I, we will set out the ground on which this opposition to granting the writ in cause Number 459 is based, and in Part II, the grounds of opposition to granting the writ in cause Number 460.

PART I. CAUSE NUMBER 459

A.

In cause Number 459 of the docket of this Honorable Court, petitioners urge that the awards as determined

upon by the Court of Appeals are inadequate, and as grounds why this Court should grant the writ and pass upon said awards, say:

> " * * * to secure that uniformity of decisions among the lower courts with respect to amount of damages allowed seamen and their families under substantially the same or similar facts." (P. 25).

This, as stated by this Honorable Court and various lower Courts, cannot be done, because, as stated by this Court in the case of *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, "No hard and fast rule by which pecuniary damages may in all cases be measured is possible. * * *" This Court therein emphasized that each case must be determined by reference to "its immediate circumstances." The awards in the case at bar were determined upon after careful consideration of the evidence before the Court herein, all as shown by the well considered opinion of the Court of Appeals.

B.

Petitioners herein err in the statement, at page 17 of their petition, to the effect that all parties consented to the matter being referred to a Commissioner, and from that erroneous premise contend that the Court of Appeals should have, under the circumstances, given to the Commissioner's findings the weight to which they contend such findings were entitled, and urge that such action on the part of the Court of Appeals is in conflict with the decisions of this Honorable Court which are cited. By reference to the order appointing the Commissioner herein, which appears at R. 46, it will be noted that it is the usual order of reference made and entered in Admiralty cases, and entered on the sole motion of "said proctors for claimants", petitioners herein. It was in no sense a con-

sent reference to a Commissioner to ascertain the damages. The terms of the order clearly show that the Commissioner's report was to be advisory only, as the said order specifically provided that the Commissioner

> " * * * take further proof that may be offered as to the amount of damages sustained by every and all of the claimants herein **and to report thereon to this court with the evidence taken before him with respect to the various claims for death, and with his opinion in addition as respects the amount of damages, etc., with all convenient speed;** such proof to be made either orally before the said commissioner or by deposition in due course of usual and legal procedure applicable in such matters; * * * " (Emphasis ours). (R. 50).

The cases, decisions of this Honorable Court, cited by petitioners in support of their contention that the action of the Court of Appeals is in conflict with said decisions, clearly fail to sustain petitioners' contention. In the case of *Davis v. Schwartz,* 155 U. S. 631, one of the said cases cited by petitioners, this Honorable Court, in referring to its decision in the case of *Kimberly v. Arms,* 129 U. S. 512, also cited by petitioners, points out that in the case of *Kimberly v. Arms supra*:

> " * * * a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to

> the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the findings of a subordinate court. 'Its findings,' said the court, 'like those of an independent tribunal, are to be taken as presumptively correct, subject indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.' As the reference in this case was by consent to find the facts, we think the rule in Kimberly vs. Arms applies, and as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive. To same effect are Crawford vs. Neal, 144 U. S. 585, 596 (36: 552, 557); Furrer vs. Ferris, 145 U. S. 132 (36: 649)."

Aside from the facts as above stated, that the order of reference in this case was the usual reference, and not one by consent of the parties, as in *Kimberly v. Arms, supra,* the Court of Appeals, in referring to the Commissioner's report, at R. 448, in part says:

> " * * * He reviewed the evidence to some extent in making his report, but did not specifically find the facts as to any claim."

We will not extend this brief by referring to the many decisions of this Honorable Court, frequently cited by the lower courts, to the effect that an appeal in admiralty is a trial *de novo,* and as stated by this Honorable Court, in the case of *Brooklyn E. D. Terminal vs. U. S.,* 287 U. S. 170, at page 176:

> "In admiralty an appeal to the court of appeals is deemed to be a trial *de novo* (citing many cases).

> An assessment of damages may be corrected if erroneous in point of law, but also may be corrected if extravagant in fact."

This right in the appellate court is likewise recognized under the new Supreme Court Admiralty Rule 43½, which in part provides that the findings of a commissioner, while presumptively correct

> " * * * shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part, when the court in the exercise of its judgment, is fully satisfied that error has been committed:"

C.

The Court of Appeals, on this trial *de novo*, and after giving careful consideration to the evidence with respect to all of the claims in general, and special consideration to each claim in particular, unanimously fixed the amounts due petitioners in a sum which they deemed proper to cover their pecuniary damages (R. 447-455). A reference to the opinion of the Court of Appeals clearly discloses the care with which that Court considered the facts herein, and that the substantial awards in the amounts determined upon by them are supported by the facts, and fully compensate petitioners for the pecuniary loss sustained by them herein.

The Court of Appeals did not differ from the Commissioner and the District Court as to the law properly applicable thereto. This is clear by the statement of the Court of Appeals in referring to the Commissioner's report (R. 448), wherein it, in part said:

> "So far as he discussed it, the commissioner correctly interpreted the law. He reviewed the evidence to some extent in making his report but did

> not specifically find the facts as to any claim. It is not clearly shown what formula he used in determining the amount to be awarded."

The Court of Appeals, in a consideration of the evidence, and in speaking of the well settled law applicable in such cases, at R. 448, further said:

> "The law is well settled. The claimants are entitled to recover in admiralty, under the provisions of section 33 of the Merchant Marine Act of June 5, 1920 (T. 46 USCA §688), which incorporates the provisions of the Federal Employers' Liability Act (T. 45 USCA secs. 51, *et seq.*) by reference. Lindgren vs. U. S., 281 U. S. 38. There may be only one recovery by the personal representative of the deceased for the benefit of all the persons entitled to damages under the act. The measure of damages is compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. In estimating this the earning power of money must be considered and an amount determined, which, capitalized at a reasonable rate of interest, would yield annually the same income the person injured might have expected from the deceased, using the interest and part of the capital from year to year. To determine this amount standard tables prepared by actuaries may be used. Chesapeake & Ohio Ry. vs. Kelly, 241 U. S. 485."

Chesapeake & Ohio Ry. vs. Kelly, followed by the Court of Appeals, is also cited and relied upon by petitioners herein.

Likewise, in considering the law applicable in case of pecuniary loss to children, at R. 448, the Court of Appeals followed the language of this Honorable Court, and stated:

> "Pecuniary loss to be recovered may include damages, 'when the beneficiary is a child, for the loss of that care, counsel, training and education **which it might, under the evidence, have reasonably received from the parent,** and which can only be supplied by the service of another for compensation.' Michigan Central R. R. vs. Vreeland, 227 U. S. 59-71." (Emphasis ours).

This decision of this Honorable Court is also cited and relied upon by petitioners herein, but at page 19 of their brief petitioners contend that the Court of Appeals erroneously held "that the children had only a right of 'theoretical pecuniary recovery for the loss of the father's care and guidance'." That petitioners err in their aforesaid contention is clearly shown by reference to the opinion of the Court of Appeals, as that Court found that there was no evidence to support this alleged element of damage. The Court, in so finding said:

> " * * * Three of these claims were also for the benefit of minor children. There is nothing in the evidence, except the general statement of the widow that the father was devoted to his children and gave them his care and affection when at home, to show the pecuniary value of his services to the children or that another would of necessity have to be employed to furnish the same care." (R. 449).

And in apportioning the Fifteen Thousand Two Hundred Fifty Dollars ($15,250.00) awarded by the Court of Appeals to Sophia Brennan, Administratrix of the petitioner herein, between the mother and children, as the Court also did with respect to other claims herein where children were beneficiaries, the Court, in its opinion, said:

> "We consider that the apportionment of $1,000.00 to each of the children would be proper.

> This will be sufficient to include any theoretical pecuniary recovery for the loss of the father's care and guidance." (R. 451).

It will therefore be noted that there is no merit in petitioners' contention that the Court of Appeals erred in applying the law as to the children, as the Court of Appeals followed the well settled law, and declined to make any allowance to the children for loss of care, counsel and training, not because, as petitioners contend, "the children had only a right to theoretical pecuniary recovery", but because, as the Court found, such allowance was not sustained by the evidence.

D.

Petitioners herein complain of, and are seeking to have this Honorable Court review the action of the Court of Appeals in adopting the rate of interest at 6% in determining the present value of money, contending that there was no evidence to support it; and that the testimony of Mitchell, the Actuary, was undisputed and to the effect that 3½% was the reasonable rate.

In this statement petitioners err, as the record shows that Mitchell, the actuary referred to by petitioners, a witness produced in their behalf, testified that he knew that his Company, an insurance company, had made investments in mortgage loans at 5 and possibly 6% that were considered good, safe investments at the time (R. 238). W. T. Weatherall, Vice-President of a bank, who testified on behalf of respondent as to present value, testified that good, safe investments could be made in certain bonds at 5% (R. 338), and investments in stock at a higher rate. He also testified to investments in 1932 at from 7% to 10% (R. 337).

In this connection the Court of Appeals said:

> "The legal rate of interest in Texas is 10% per annum. Doubtless many well secured loans are made at that rate. United States bonds as a rule do not pay more than 3% but there are many state bonds and sound industrial securities that pay at least 6% per annum interest. Courts are not bound to adopt either the highest or the lowest rate of interest in determining the amount to be awarded." (R. 449).

The Court then referred to two of its prior decisions wherein it adopted 6% interest, to-wit: *Ramjak v. Austro-American S. S. Co.*, 186 F. 417, and *U. S. v. Boykin*, 49 F. (2d) 762.

On page 58 of the brief in support of the application for writs herein, petitioners urge that the Commissioner and both lower courts were required as a matter of law to determine the compensatory damages sustained in each case in accordance with this mathematical evidence as being the most accurate and trustworthy criterion. That such a contention is clearly contrary to the well settled law is shown by the following reference. In the case of *Coast Steamship Co. v. Brady*, 8 F. (2d) 16, the Court of Appeals for this Circuit in considering a charge to the jury involving the contention that the jury were required to adopt the mathematical calculation, and to fix absolutely the amount of loss of plaintiffs' earning capacity, stated that if the contention was sustained then the charge under the decision of the Supreme Court, in the case of *Vicksburg etc. Railroad Company v. Putnam*, 118 U. S. 545, was erroneous. At page 19 the Court of Appeals further says:

> " * * * The jury were not instructed that they were bound by the annuity table, but that they might consider it. As far as the record shows, defendants did not request any charge on the measure of damages. They could have submitted

explanatory charges calling to the attention of the jury the probability that plaintiff might not always have employment and that his earning capacity in his declining years might be less than at the time of his injury. The Court's charge required the jury to take into consideration all the evidence relating to plaintiff's health, habits, and occupation, and therefore charges to the effect just indicated would not have been contradictory or inconsistent with the charge which was given. * * * "

In the case at bar the Court of Appeals states that

"There is no mathematical formula for exactly determining the loss * * * ." (R. 449).

F.

That the Court of Appeals, in determining the measure of damages followed the well settled law is further shown by reference to their opinion, wherein they say:

"* * * The measure of damages is compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. In estimating this the earning power of money must be considered and an amount determined, which, capitalized at a reasonable rate of interest, would yield annually the same income the person injured might have expected from the deceased, using the interest and part of the capital from year to year. To determine this amount standard tables prepared by actuaries may be used. Chesapeake & Ohio Ry. v. Kelly, 241 U. S. 485." (R. 448).

Petitioners, in their petition and brief, also cite this decision of this Honorable Court. It is evident that petitioners do not differ with the Court of Appeals on the law, but merely as to what constitutes a reasonable rate of

interest in calculating present value, contending that an interest rate of 3½% would be reasonable, the Court of Appeals determining upon a 6% rate as reasonable.

G.

Petitioners herein complain of, and as grounds of review by this Honorable Court, contend that the Court of Appeals erred in their modification of the judgment of the lower Court in holding that interest thereon should run from date of final decree of the District Court, instead of from date of the Commissioner's report, as allowed by the District Court.

The report of the Commissioner to whom the District Judge, on motion of claimant, petitioner herein, referred this matter to ascertain the damages, and in accordance with the order of Court appointing him "to report thereon to this Court with the evidence taken before him with respect to the various claims for death and with his opinion in addition as respects the amount of the damages, etc." duly complied with this order and filed his report. To this report petitioners and respondent both filed exceptions, and on a hearing the District Court modified the Commissioner's report. The Court of Appeals in this trial *de novo* modified the lower court's opinion as to the amount of damages allowed, and also determined that interest should run from date of final decree in the district court. On this question the Court of Appeals said:

> "The judgment awarded interest to the claimant at the rate of 6% per annum from February 28, 1935, the date of the filing of the commissioner's report. The report merely recommended the amounts to be awarded and did not fix the liability of the company. The act does not provide for interest before the damages are determined. Cortes vs. Baltimore Insular Line, 66 F.

(2d) 526. In admiralty the allowance of interest is discretionary with the court. In this case interest should be allowed at the rate of 6% per annum from July 18, 1935, the date the decree was entered in the District Court." (R. 455).

In the case of *Cortes v. Baltimore Insular Line, supra,* cited by the Court of Appeals, it is held by the Court of Appeals for the Second Circuit that neither the Jones Act or the Employers' Liability Act permits the awarding of interest on damages before the damages are judicially ascertained; that Court cited cases in support of this holding.

Petitioners do not contend that there is any conflict between the various Circuit Courts of Appeals on this question, and do not cite any authorities to support their contention that the Court of Appeals erred in holding that interest on damages should run from the date of the final decree in the District Court.

PART II. CAUSE NO. 460

This cause came before the Court of Appeals on a cross appeal taken by petitioner herein from the final decree of the District Court, affirmed by the Court of Appeals, disallowing the claim filed by Mrs. Jennie Royakers as administratrix to recover damages for the death of her son, Edward C. Van Beeck who was second mate on the "Coney". With respect to this claim it was stipulated that the deceased left surviving him his mother and a brother, age 34. After filing the claim his mother died, in July, 1931, before the award had been recommended by the Commissioner. The brother, Charles Van Beeck, qualified as administrator of the estate of his brother, and was substituted in place of his mother, the former administratrix.

Cross Appellant and petitioner herein, contends that judgment should have been granted for the amount recommended by the Commissioner. The Court of Appeals, in affirming the decree of the district Court and in disallowing the award of Seven Hundred Dollars ($700.00), in its opinion said:

> "The statute (T. 45 U. S. C. A. §51) creates three classes of beneficiaries, (1) the surviving widow or husband and children of the employee, (2) the employee's parents and (3) the dependent next of kin of the employee. Each class excludes those following, in the order named, and non-dependent collaterals are not entitled to recover. Before the passage of the Merchant Marine Act there could be no recovery for damages for the death of a sailor occurring on the high seas. Nor could there be any recovery for death of a common law. In Martin's Administrator vs. Blto. & Ohio R. R., 151 U. S. 673-703, an action was brought by Martin to recover damages for personal injuries to himself. A verdict was directed for defendant. Pending an appeal, Martin died and his administrator was substituted. On suggestion of his death, in the Supreme Court, it was held that the action abated by the death of the injured party, under the law of Virginia, where the action was brought, and that the administrator had no right to maintain the action. In Chicago, Burlington & Quincy R. R. Co. vs. Wells-Dickey Trust Co., 275 U. S. 161, it was held that the liability is to one of the three classes named in the act and not to the several classes collectively; and if the person entitled to recover at the time of the employee's death dies before a recovery of the compensation, the cause of action dies also.
>
> "There is no doubt that the cause of action abated with the death of the mother, who at the time of her son's death was the sole beneficiary

> entitled to recover, to the exclusion of all others. It is clear there could be no recovery on this claim." (R. 454).

This Honorable Court, in the case of *Chicago Burlington-Quincy R. R. v. Wells-Dickey Trust Company*, cited and relied upon by the Court of Appeals herein in speaking of the act in question (T. 45 U.S.C.A. §51) at page 163 said:

> "The contention is that if one entitled at the death of the employee to the compensation dies thereafter before a recovery, the action may be brought on behalf of the class next in line. There is no basis in the act for such a shifting of the beneficiary. The statute does not provide for a life interest in one, with remainder over to others in the line of distribution, nor does it provide for vesting the right to compensation in the one, with a conditional limitation to another, in case the one entitled at the death happens to die thereafter without having secured recovery."

It is clear therefore, that the Court of Appeals did not misconstrue but properly followed the law as laid down by this Honorable Court.

Notwithstanding this clear declaration of the law petitioners, at page 16 of their petition, in referring to the action of both lower Courts in disallowing this claim, say:

> " * * * Both courts base their erroneous conclusion upon their misconstruction of the case of Chicago B. & Q. Ry. Co. vs. Wells-Dickey Trust Co., 275 U. S. 161, 48 S. Ct. 73."

And at page 17 further say that

> "Such holding of the Circuit Court of Appeals with respect to the Van Beeck claim is in conflict with decisions of another Circuit Court of Appeals and of a District Court; and said Court has thus 'decided an important question of general law in a way probably untenable and in conflict with the weight of authority;' as shown by the following decisions: Union Steamboat Co. v. Chaffins' Administrators (C. C. A. 7) 204 F. 417; The City of Rome (D. C. N. Y.) 48 F. (2d) 341-342; Sider v. General Electric Co., 238 N. Y. 64, 143 N. E. 792, 34 A. L. R. 156."

There is absolutely no conflict between the instant case and those cited above by petitioner. The case of *Union Steamboat Co. v. Chaffins' Administrator, supra,* was decided under the death statute of Illinois. The case of *Sider v. General Electric Co., supra,* was decided under the death statute of New York. The case of *The City of Rome* was decided under the Death on the High Seas Act, 46 U. S. C. A. Sec. 761, an act not similar to the one involved in the instant case. Further, in *The City of Rome* case the facts were different than involved herein. In that case, a decree as to liability was rendered February 26th, 1928. See same case reported in 24 F. (2d) 729. The claimant was then living, and she became vested with a judgment in her favor, a judgment which decreed a recovery in her favor. That, as shown by the report of the Commissioner to whom the matter was referred to ascertain the amount of the damages, the claimant died about seven months after this decree as to liability. This report is set forth in the report of the case in 48 F. (2d) 333, and at page 341 this claim is discussed. This authority, we feel, needs no further comment, as the facts are not analogous to the claim of the mother of the deceased herein, the designated beneficiary, who died long before the decree as to liability was rendered herein.

We respectfully submit that in disallowing this claim both the lower courts followed the well settled law applicable in such cases.

CONCLUSION

We respectfully submit that in Cause No. 459 the writ should be denied as the Court of Appeals gave careful consideration to each of the claims herein, and the awards as determined by the Court are in a sum which, from the evidence herein, fully compensate petitioners for the pecuniary damages sustained. The decision of the Court of Appeals herein followed the well settled law, as settled by this Honorable Court, and arrived at awards that the Court considered just and proper after considering the facts involved as to each claim.

That in Cause No. 460, the writ should be denied, as the decision complained of by both lower Courts is in harmony with the decisions of this Honorable Court on the question of the law applicable to the facts with respect thereto.

Respectfully submitted,

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FILED
FEB 3 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936

No. 460

CHARLES VAN BEECK, ADMINISTRATOR, ETC.,
Petitioner,

versus

SABINE TOWING COMPANY, INC., ET AL.,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT.

This Court granted a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Fifth Circuit, limited to the question of whether cause of action under the Merchant Marine Act, Sec 33, commonly known as the Jones Act (46 USCA 688), abated with the death of the mother of Edward C. Van Beeck.

The United States Circuit Court of Appeals for the Fifth Circuit, in affirming the action of the District Judge in disallowing a Commissioner's award to the mother, said:

> "The cross appeal is taken to the rejection of a claim filed by Mrs. Jennie Royackers as adminis-

tratrix to recover damages for the death of her son, Edward C. Beck, who was second mate on the Coney. It appears from the stipulation in the record that Edward C. Van Beck left surviving him his mother and a brother aged 34. After filing the claim his mother died in July, 1931, before an award had been recommended by the commissioner. The brother Charles Van Beck, qualified as administrator of the estate of his mother and was substituted in place of his mother, the former administrator. Cross appellant contends that judgment should have been granted for the amount recommended by the commissioner, $700.00.

"The statute (T. USCA §51) creates three classes of beneficiaries, (1) the surviving widow or husband and children of the employee, (2) the employee's parents and (3) the dependent next of kin of the employee. Each class excludes those following, in the order named, and non-dependent collaterals are not entitled to recover. Before the passage of the Merchant Marine Act there could be no recovery for damages for the death of a sailor occurring on the high seas. Nor could there be any recovery for damages for death of a common law. In *Martin's Administrator v. Blto. & Ohio R. R.*, 151 U. S. 673-703, an action was brought by Martin to recover damages for personal injuries to himself. A verdict was directed for defendant. Pending an appeal, Martin died and his administrator was substituted. On suggestion of his death, in the Supreme Court, it was held that the action abated by the death of the injured party, under the law of Virginia, where the action was brought, and that the administrator had no right to maintain the action. In *Chicago, Burlington & Quincy R. R. Co., v. Wells-Dickey Trust Co.*, 275 U. S. 161, it was held that the liability is to one of the three classes named in the act and not to the several classes collectively; and if the person entitled to recover at the time of the employee's death dies before a recovery of

the compensation, the cause of action dies also.

"There is no doubt that the cause of action abated with the death of the mother, who at the time of her son's death was the sole beneficiary entitled to recover, to the exclusion of all others. It is clear there could be no recovery on this claim." (R. p. 43, 44).

In support of the foregoing statement of law that such an action abates on the death of the beneficiary, we refer the Court to the following:

In the case of *Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 38 L. ed. 311, this Court, at page 318, said:

"By the Judiciary Act of September 24, 1879, chap. 20 §31 (1 Stat. at L. 90) following the statute of 8 & 9 Wm. III. c. 11 §§6, 7, and since embodied as follows in the Revised Statutes, 'when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment,' and upon *scire facias* judgment may be rendered for or against him; * * *

"These statutes authorize the executor or administrator to prosecute or defend in those cases only in which the cause of action survives by law, and do not undertake to define what those cases are.

"The question whether a particular cause of action is of a kind that survives for or against the personal representative of the deceased person is a question not of procedure, but of right. As was said by Chief Justice Waite, speaking for this court: 'The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account

> of which the suit was brought, is one that survives by law. Rev. St. §955.' 'The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. Stat. §914. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it.' *Re Schreiber,* 110 U. S. 76, 80 (28:65,66). In that case, the right in question being of an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. * * * *"*

The following cases support the same view:

Exparte: In the Matter of *Francis Schreiber,* 110 U. S. 76;

Michigan C. R. Co. v. Vreeland, 227 U. S. 59;
Sanders Adm'x v. Louisville & N. R. Co. (C. C. A. 6) 111 Fed. 708.

The substance of the cause of action now before the Court is governed by the Merchant Marine Act of 1920 (46 USCA, Section 688), and usually referred to as the Jones Act. The Employers' Liability Act (45 USCA, Section 51) was embodied in the Jones Act by reference, and the statute known as Death of Parties; Substitution of Executors or Administrators is embodied in 28 USCA, Section 778. (These statutes are set out for the convenience of the Court in the appendix hereto.)

It will be noted that both the Merchant Marine Act and the Employers' Liability Act are silent as to the survival of the right of action of a deceased beneficiary.

This Court, in the case of *Chicago B. & Q. R. Co. v. Wells-Dickey Co.*, 275 U. S. 161, in speaking of the Act now before the Court, at page 164 says:

> "There are thus, three classes of possible beneficiaries. But the liability is in the alternative. It is one of the three; not to the several classes collectively. * * * The statute does not provide for a life interest in one, with remainder over to others in the line of distribution. Nor does it provide for vesting the right to compensation in the one, with a conditional limitation to another, in case the one entitled at the death happens to die thereafter without having secured recovery."

The Statute concerning Death of Parties: Substitution of Executors or Administrators, provides only that:

> "When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, *in case the cause of action survives by law,* prosecute or defend any such suit to final judgment." (Italics ours).

Such being the situation here presented, we refer to the case of *Caillouet et al. v. American Sugar Refining Co. et al.* (D. C., E. D. Louisiana) 250 Fed. 639. Foster, District Judge, now presiding Judge of the Circuit Court of Appeals for the Fifth Circuit, in speaking of the cause of action for damages under the Sherman Law, at page 640, says:

> "The Sherman Law is silent as to the survival of the right of action. As there is no other statute of the United States in point, whether the action

> survives or not must be determined by the principles of the common law, regardless of the law of Louisiana. Schrieber v. Sharpless, 110 U. S. 80, 3 Sup. Ct. 423, 28 L. ed. 65; Michigan Central R. R. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176."

In referring to the common law we refer to the case of *Gerling v. Baltimore & O. R. Co.*, 161 U. S. 673, 38 L. Ed. 311, wherein this Court, at page 320, said:

> "By the rule of common law, *actio personalis moritur cum persona*, the death of the sole plaintiff or of the sole defendant before final judgment abated any personal action, except that, if the death occurred in vacation after verdict, judgment might be entered as of the preceding term. * * "

The following cases support the same view:

Michigan C. R. Co. v. Vreeland, 227 U. S. 59;

Martin's Administrator vs. Blto. & Ohio R. R., 151 U. S. 673-703;

Sanders' Adm'x v. Louisville & N. R. Co. (C. C. A. 6th Cir.) 111 Fed. 708.

This Court, in speaking of the Employers' Liability Act (which was incorporated in the Merchant Marine Act by reference), in the case of *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 74, 57 L. ed. 417, at page 421, says:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act §124; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 231, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; Read v. Great Eastern R. Co.

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"The distinguishing features of that act are identical with the act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

"The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. * * * "

In *Calliout et al vs. American Sugar Refining Co. et al. supra*, the Court held:

"At common law as a general rule all actions *ex delicto* abate with the death of either party. * * * *"

In the case of *Gilkison v. Missouri Pac. Ry. Co.*, Supreme Court of Missouri, 222 Mo. 173, 121 S. W. 138, the court, in considering their statutory laws with respect to survival of actions, that is, their statute providing that whenever a person dies from such wrongful act of another as would have entitled the person to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, nothwithstanding the death of the party receiving the injury. And also their statute providing that for all wrongs done to property, rights, or interest of another for which an action might be maintained against the wrongdoer such action may be

brought by the person injured or after his death by his executor or administrator against such wrongdoer. The court held that the cause of action of the beneficiary died with her because there was no statute surviving same as the wrong was to the social and domestic relations of persons, a civil wrong or tort, and not a property right which would come under their survival of action statute. The Court, in discussing this point, at page 145, says:

> "But that case, like all of the others relied upon by respondent's counsel, ignored the distinction between the laws that govern rights of property. The former govern, among other rights, the social and domestic relations of persons, while the latter control the rights of property. The violation of the former is not a violation of a property right, but is the violation of a social duty or a wrong done to the domestic relations. A wrong done to society is denominated by a misdemeanor or a crime, and those to the domestic relations and to property *are called civil wrongs or torts.* The former is punishable by imprisonment or fine, payable to the state; and the latter is generally righted by the wrongdoer paying the damages done by him to the injured party. (Italics ours).
>
> "By applying these observations to the case at bar, we would convict appellant of violating the domestic relations of respondent's intestate—that is, of wrongfully taking the lives of deceased father and mother, and thereby deprive him of his legal rights to have his parents to care for, support, and educate him, for which he is entitled to recover pecuniary damages in dollars and cents—but it would clearly be a misnomer to say, nor could it be logically contended, that the wrongful killing of deceased parents was a wrong done to his property or to his property rights. It would be just as logical to say the wrongful killing of the husband would be a wrong and injury to the

wife's property rights, and that, upon her death, the cause of action given to her by said section 2864 and 2865 would upon her death under said section 96 survive in favor of her executor and administrator, yet every court in Christendom so far as my knowledge and investigation has gone, are unanimous in holding, under those statutes, her cause of action does not survive but abates with her death. But, if the minors cause of action, which is given by the same statute that gives to the wife hers, does not abate with the former's death, then by what process of reasoning can it be logically contended that the wife's cause of action abates upon her death? Certainly such an argument cannot be based upon the ground that the husband did not owe the wife the same care, support, and maintenance that he and his wife owed to their minor children. Under our laws, not only does he owe her the same duty, but, if he does not perform it, she may sue for and compel him to properly care for and support her, just as their minor children may do; and not only that, but so grave is the offense of the husband in not caring for and supporting his wife she may on that account sue for and obtain a divorce from him. Could it be seriously contended that the wrongful killing of a woman's husband is an injury to her property rights? I think not; yet she is just as much entitled to the care, society, and support of her husband as are his minor children. According to all laws, excepting the cases before considered, the unlawful killing of a husband or father is a wrong done to the personal rights of the wife and the child, and not to their property rights. * * "

Likewise, the Supreme Court of Arkansas, in the case of *Bellingsley v. St. Louis, etc. R. O.*, 84 Ark. 617, 107 S. W. 173, held that:

> "Such rights as arise out of the domestic relations are not property."

In the case of *Woodward v. Chicago,* 23 Wis. 400, the Supreme Court of Wisconsin held that such an action as here presented was an action of tort. The court, in referring to this point said:

> "The statute of this state reads as follows: 'And the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recoverable shall be paid over to his or her lineal descendents, and to his or her lineal ancestors in default of such descendants; and in every action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relations of the deceased specified in this section.'
>
> "It being, therefore, an action of tort, and the sole party in interest having died, the next inquiry is, whether it falls within the general rule of the common law, that such an action does not survive the death of the party in whose favor it existed. It is very clear to our minds that it is not distinguishable in this particular from other actions of tort, and that the common law must govern, unless it has been taken out of the operation of that rule by some express provision of statute. We know of no such provision. * * * The provisions of statutes allowing actions of tort to survive are strictly construed, so as not to extend the exceptions beyond the clear intent of the legislature."

In the case of *Doyle v. Baltimore & O. R. Co.,* 90 N. E. 165, the Supreme Court of Ohio, in speaking of the right of action of the widow for the wrongful death of her husband, at page 168, says:

> "It would seem from the consideration of the entire record, that, the statute having given the right of action in this case for the exclusive benefit of the widow, that right in her could neither ascend to her mother, or cross over to the collateral heirs of her deceased husband, unless the statute so provides; and it does not so provide."

In *Schmidt v. Menasha Wooden-Ware Co.*, 99 Wis. 300, 74 N. W. 797, the Supreme Court of Wisconsin, in considering its wrongful Death Statute, says:

> "Under the common law, the right to prosecute the defendant for its alleged negligence in causing the death of Schmidt did not survive. But the wisdom of the legislature has provided that the offending party shall not escape responsibility. Section 4255, 4256 Rev. St. give a new action, in this case, to the widow, and a right to recover such damages as the jury may deem fair and just in reference to the pecuniary loss to her resulting from such death. The damages that could be recovered are limited to a mere indemnity for the resulting injury to the widow (citing authorities). Such damages do not go to the estate of the deceased but to the beneficiary named in the statute. * * * The theory of the statute as interpreted by decisions is that certain beneficiaries named therein, who have sustained an injury by reason of wrongful death, are entitled to be recompensed for the actual loss sustained. The fact that certain beneficiaries named therein take to the exclusion of others would seem to indicate that the legislature never intended that the provisions should inure to the benefit of persons not named therein. It is in harmony with this construction that this court held in he Topping Case that a complaint was demurrable that did not show that there were beneficiaries in existence who had sustained some pecuniary injury resulting from death. * * * The right of recovery, therefore, is

personal, and dependent upon pecuniary loss. Moreover the action must be brought by and in the name of the personal representative of such deceased person. There is no authority for its maintenance by any other person. * * * This court held in a very similar case that upon the death of the real party in interest, the action abated, and could not, in absence of a statute saving the right, be further prosecuted. Woodward v. Railway Co. 23 Wis. 400. That case is decisive of this appeal."

In the case of *Sanders' Adm'x v. Louisville & N. R. Co.* (*C. C. A. 6th Cir.*) 111 Fed. 708, in speaking of the Statute of Tennessee for negligent death, at page 709 says:

"The right of action in the state of Tennessee for the negligent death of a human being is purely statutory. We must therefore look to the statute to determine when and in whose favor the right of action survives, and by whom such an action may be brought. * * "

And at page 711 further says:

" * * The case of Railroad Co. v. Bean is more in point, and is decisive of the question. The action was by the administrator of the deceased for the use and benefit of a judgment for the plaintiff. The defendant sued out a writ of error, pending which the widow died. A motion was made in the supreme court to abate the suit because of the death of the widow, who was sole beneficiary and the real plaintiff. The court said:

" 'We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery at the death of deceased, when the cause of action accrued. In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator for her benefit. The right of recovery having once vested in the widow, it did not

> pass upon her death to her personal representative; neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished. ' "

The foregoing authorities and statutes of the United States show clearly that the death of the beneficiary abated the action as there was no survival of the beneficiary's action either by statute or at common law. The authorities further show that the statute under consideration provided for designated beneficiaries for whose use the action was to be prosecuted to the exclusion of all others. The decision of the Circuit Court of Appeals holding that the action abated on the death of Mrs. Jennie Royakers is in accordance with the decisions of this Court, the Circuit Court of Appeals of the Sixth Circuit, and the foregoing decisions of the State Courts.

The petitioner's contention that the Circuit Court of Appeals, in its holding is in conflict with the established law is not sustained. In referring to the cases quoted from in petitioner's brief, we desire to point out that in those decisions the courts not only referred to their "Death by Negligent Act Statute" but also to another statute of the State providing for "Survival of Action in Case of death."

In the case of *Cooper v. Shore Electric Co.*, 63 N. J. L. 558, 44 Atl. 632, quoted from by petitioner, the Court of Errors and Appeals of New Jersey had before it a statute of their state with respect to survivorship of actions. In speaking of the statute the Court, at page 634, says:

> "The efficient words of this statute are, 'trespass to the person or property, real or personal.'

> For such an injury the statute provides that the action shall survive to and against personal representatives."

The Court further, in speaking of this statute, says:

> "In the first of these cases it was said by Chief Justice Beasley that this act is highly remedial in its character: 'Its intent was to relieve against the harsh injustice of the old rule, *actio personalis moritur cum persona.*' * * * The statute, therefore, is to be liberally construed, so as to advance the remedy for this imperfection.' The Chief Justice, in his opinion, declared that the word 'trespass', in its comprehensive signification, embraced every infraction of a legal right. 'In this sense it comprehended not only forceable wrongs where the damages were direct and immediate, but also acts and consequences of which made them tortious.' * * * In my opinion, the word trespass, as used in the section under consideration, must be received as equivalent in meaning to the word 'tort,' so that the effect of the provision is to give a right of suit against the personal representatives of a deceased wrongdoer for any injurious act of a suable nature, without reference to the form in which the remedy must be sought."

The court further stated that the above referred to Act did not give a remedy for injuries resulting from the death of a person, stating that this imperfection in the law was remedied by a later statute, the New Jersey Death by Wrongful Act, the Court after considering this statute, giving a right to designated beneficiaries of the deceased person, again refers to the survival of action statute first above referred to and at page 636, says:

> "His right to be compensated for the pecuniary injury sustained was such a property right as, under the legal principles that controlled in the construction of the preceding statute, would give

> the cause of action the quality of survivorship, and take it out of the maxim, '*actio personalis moritur cum persona.*' By the machinery adopted by this statute for the enforcement of this pecuniary injury, such suit would survive to the personal representatives of the first deceased."

In the case of *Shawee v. Check*, 41 Okla. 227, 137 Pac. 724, quoted from by petitioner, the Court, in considering the question presented in the instant case, had before it not merely their death by wrongful act statute, but also their survival of action statute. The court in speaking of this statute says:

> "Section 4312 Stat. 1893 (section 5280, Rev. Laws 1910), reads: No action pending in any court shall abate by the death of either or both of the parties, thereto. * * *
>
> "But we do not understand this section to impart the quality of survivability to causes of action which do not have that quality under the next preceding section (section 4311, Stat. 1893, same being section 5279, Rev. Laws 1910) which reads: In addition to the causes of action which survive at common law, causes of action for mense profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

In the case of *Sider v. General Electric Co.*, 238 N. Y. 64, 143 N. E. 792, quoted from by petitioner, is a case arising under the New York law. This case refers to *Meekin v. Brooklyn H. R. R. Co.*, 164 N. Y. 145, 58 N. E. 50. In this latter case the court says:

> "Creigin v. R. R. Co. 75 N. Y. 192, 194, the court said: 'The rights and interests, for tortious injuries to which this statute preserves the right

> of action have frequently been considered; and it is generally conceded that they must be pecuniary rights or interest by injuries to which the estate of the deceased is diminished.' "

In the case of *Cregin v. R. R. Co.*, 75 N. Y.192, the Court refers to the New York survival of action statute and says:

> "Section 1 preserves from abatement by death, actions 'for wrongs done to the property, rights, or interest of another.' This language is very broad and embraces a large class of actions. It is not confined to direct injuries to property, but includes all injuries to the rights or interest of a deceased party, except such as are enumerated and exempted in the following section: No. 2. These are, actions for slander, libel, assault and battery, false imprisonment and actions on the case for injuries to the person of the plaintiff. These exceptions necessarily prevent the surviving of any action for slander, libel or assault, and battery or false imprisonment, or for any injury to the person of any deceased plaintiff, however seriously such injury may have affected his property or estate. But they do not cover an action for a wrong done to his rights or interests, even though this wrong may have been effected by means of an injury to the person, provided the injury was not to the person of the plaintiff, but some other party."

The statute preserving rights and interest for tortious injuries:

In the case of *Union Steamboat Company vs. Chaffins' Administrators*, 204 Fed. 412, (C. C. A. 7th Cir.) quoted from by petitioner, the court followed the New York Rule as decided in the case of *Meekin v. Brooklyn H. R. Co.*, 164 N. Y. 145, 58 N. E. 50, which we have previously shown was decided on the statute of survival of

action statute of New York, and not merely on the Death by Wrongful Act statute.

There is therefore nothing in the preceding cases above referred to, that would have any bearing upon the case now before this Court, which concerns the interpretation of the Merchant Marine Act of 1920 at 46 USCA Section 688, and usually referred to as the Jones Act. The Employers' Liability Act (45 USCA Section 51) which was embodied in the Jones Act by reference and Death of Parties, Substitution of Executor or Administrator. (28 USCA Section 778.)

In the case of *The City of Rome*, 48 F. (2d) 333, District Court S. D. New York cited by Petitioner, and holding that the action did not abate on the death of the beneficiary, merely followed the authorities of the State of New York and New Jersey, which authorities we have hereto shown were decided not simply upon the "Death by Negligent Act Statute" but also on another statute of the State with respect to the survivability of actions. Such holding in the above case is therefore clearly not a determination of the question now before this Honorable Court, as is stated in *Taylor v. Taylor*, 232 U. S. 363, at page 370:

> "It is clear from these decisions that the source of the right of plaintiff in error was the Federal Statute."

The statute herein is designed and intended in aid of seamen, and those dependent upon their earnings. As to this, this court in *Cortes v. Baltimore Insular Line*, 287 U. S. 374, 376', 77 L. ed. 373:

> "This Court has held that the Act (the Jones Act) is to be liberally construed in aid of its beneficent purpose to give protection to the seaman,

and to those dependent on his earnings." (Italics ours.)

The statute is not aimed or intended as an estate rights of the deceased, *Lindgren v. United States,* 281 U. S. 38; nor of the estate of a beneficiary, but as stated, it was intended purely as a personal aid in case of death to the beneficiaries dependent upon his earnings. In the instant case, the Administrator, as substituted, is making no claim on behalf of anyone who was dependent upon the earnings of the deceased. We therefore respectfully submit that neither under the Federal Statutes, nor at common law, does the action in the instant case survive the death of the beneficiary.

We therefore pray that the judgment of the Circuit Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

M. A. GRACE,
EDWIN H. GRACE,
DANIEL H. GRACE,
MILTON C. GRACE,
Counsel for Respondent.

New Orleans, La.

APPENDIX.

46 USCA §688:

Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 5, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.)

45 USCA Section 51:

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal rep-

resentative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, §1, 35 Stat. 65.)

28 USCA §778:

Death of parties; substitution of executor or administrator. When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any suit to final judgment. The defendant shall answer accordingfily, and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

The provisions of this section shall apply to suits in equity and in admiralty as well as to suits at law, and the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States, and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its *scire facias* to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof. No executor or administrator shall be made a party unless such service is made before final settlement and distribution of the estate of said deceased party to the suit.

This section shall apply to suits in which any party has deceased prior to November 23, 1921, as well as to suits in which any party may have died thereafter or may die hereafter. (R. S. §955; Nov. 23, 1921, c. 142, §§1, 2, Stat. 324*; Dec. 22, 1921, c. 18, 42 Stat. 352.)

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*"Stat. 324" should read "42 Stat. 323, 324."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 459.

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
PETITIONERS,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI.

M. G. Adams,
H. C. Hughes,
Counsel for Petitioners.

Howth, Adams & Hart,
Lockhart, Hughes & Lockhart,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 459.

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
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VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR REHEARING.

Come now the above named Sophia Brennan, administratrix of the estate of William Brennan, deceased; Bertha M. Pyle, administratrix of the estate of Orville Glenn Pyle, deceased; Adolphine Durio, administratrix of the estate of Cyrus Durio, deceased; R. L. Causey, administrator of the estate of Stewart Causey, deceased; Ora Kenney, administratrix of the estate of Joseph Hay-

den Kenney, deceased; W. M. Crook, administrator of the estate of C. L. Nelson, deceased; and Ruth Anderson, administratrix of the estate of H. A. Anderson, deceased, and present this their petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show:

We regret the necessity of further pressing upon the attention of this Honorable Court the gravity of the wrongs inflicted upon them by the lower court's decision. That decision, if permitted to stand, will do even greater violence and damage to our established and orderly principles of law.

The original petition for the writ was based exclusively upon issues of law; and no controverted fact issues were involved. Petitioners would not have applied for the writ, in the first instance, if it had been based upon disputed fact issues; but, as shown in the original petition, the facts were entirely without dispute; and, therefore, the findings and decision of the Circuit Court present pure questions of law.

In the original petition we clearly pointed out that there was no controversy about the ages of any of the parties, their joint life expectancies, the time and duration of the employment of the decedents, and the amounts they were contributing and probably would have contributed in the future to their families. Therefore, the question of amount of damages in each claim rested upon facts about which there was no dispute; and, in such circumstances, when a wrong criterion is used for measuring and estimating the damages, the error becomes one of law and not of fact.

The Circuit Court "departed from the accepted and usual course of judicial proceedings," in the following respects:

1. It laid down a palpably incorrect and erroneous criterion for measuring damages in death injury cases; and, in total disregard of the undisputed evidence, determined the amount of damages exclusively upon its own extravagant criterion and upon its own personal opinion.

This is certainly an error of law that should be supervised and corrected by this court.

That this assertion is accurate and not at all exaggerated is amply established by the following excerpt from the opinion:

> "Assuming the testimony of the widows to be truthful, it is beyond dispute that the husbands, upright, faithful and devoted, derived as much benefit from the upkeep and happiness of the families as did the wives. We consider it to be a fair estimate to say the family had lost an amount equivalent to one-half of what the father and husband earned" (R. 450).

Therefore, the lower court held, as a matter of law, despite the undisputed evidence to the contrary, that the families were entitled to only one-half of the earnings of the decedents and that the proper measure of damages was the present worths of such one-half of the earnings. If this be the law—as it assuredly will be unless this court corrects the holding—then in the future it will be useless in any case to make any proof other than that of the salary of the husband and the joint life expectancy of the husband and wife.

In *Brooklyn Eastern Terminal Company* v. *United States*, 287 U. S. 170, 53 S. Ct. 103, 105, involving a proper criterion in determining damage to a yacht, this court, through Mr. Justice Cardozo, states the law that is pointedly applicable to the case at bar:

> "A wide range of judgment is conceded to the triers of the facts in the choice of the standard to be applied and in the method of applying it. The choice, however, may not be arbitrary, nor is the range of judgment without limit. We think that, on the face of this award, there is declared a principle of assessment that, in the setting of the circumstances, exceeds the bounds of any discretion allowed to the assessors. * * * *An assessment of damages may be corrected, if erroneous in point of law, but also it may be corrected if extravagant in fact.*".

If the criterion is erroneous, this court has been quick to grant relief, even though the measure is too low. *Pierce* v. *Tenn. Coal & Iron Ry. Co.*, 173 U. S. 117, 19 S. Ct. 335.

2. The opinion below disregarded the binding effect of the concurrent fact findings of the commissioner and the lower court—a principle established for the benefit of litigants as well as for the appellate courts—a principle so uniformly recognized and applied by all the courts that the bar throughout the United States justly relies upon its enforcement, regardless of whether it be for or against their clients. There was not the slightest legal justification for making this case an exception to the general rule. The commissioner made specific findings and assessed the damages based thereon and made his report to the trial court (R. 341-353). The District Court,

after reviewing the evidence, approved these findings and entered final judgment based thereon (R. 391-396). If these statements be questioned, we respectfully request the court to read the findings of the commissioner and the approval thereof by the trial court.

Thus, the Circuit Court, without evidence, set aside the concurrent findings of two lower tribunals, which were not only amply supported, but based upon undisputed testimony.

This action of the court was error and raised a conflict in the authorities with respect to the conclusive and binding effect which should be given to the concurrent decisions of two lower tribunals and should be revised by this court. In all other circuits all parties would be concluded by these concurrent findings. The Fifth Circuit, in other cases, has followed the general rule, but it has made an exception in the instant case; and, realizing that it should have some justification for deserting and refusing to follow the usual path, it gives "the lame and impotent" reason that the commissioner did not "specifically find the facts as to any claim" (R. 448); but the record clearly and conclusively demonstrates that the commissioner did find the specific facts underlying each claim, as above shown.

The Supreme Court has consistently followed the rule that it will not disturb the concurrent fact findings of two lower courts, unless their findings are clearly erroneous. This rule obtains and is applied by all the Circuit Courts of Appeals and by this Honorable Court with respect to

the findings of commissioners and trial courts. *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 239; *The Eastland* (CCA 7), 78 F. (2d) 984, 988; *The June Ames* (CCA 2), 66 F. (2d) 415; *Packard* v. *Southern States Power Co.* (CCA 5), 46 F. (2d) 789.

In *The June Ames, supra,* the Second Circuit said:

> "The issue depended upon whom to believe, and the commissioner's finding, in such a case, certainly when affirmed by the judge, is conclusive. This seems a hard lesson for the Bar to learn, but we will not slacken our rule regarding it."

This presents a question of uniformity in the admiralty law and practice and is one which should be considered and enforced by this court.

3. The awards made by the Circuit Court were not based upon any evidence, but were based exclusively upon conjecture and the personal opinion of that court.

The whole theory upon which the court below proceeded to judgment was plainly erroneous in law, and in fact because "upright, faithful and devoted husbands" do not spend their salaries on the basis of receiving one-half of the returns, or one-half of the pleasure and benefit from the family life; but they devote their earnings to the maintenance of their families because of the love which they have for them and without any motive of financial reward. When the husband is dead, the family is deprived of his income; and to say, as a matter of law, because he is no longer with them, that they are entitled to only one-half of his income is such a preposterous error of law and extravagant criterion of damages that it should

be corrected and not permitted to have even the apparent approval of this Honorable Court.

4. The decision below penalized the widows who had children by deducting from the amounts that should have been awarded them the amounts awarded the minors as compensation for loss of parental love, care and training; such compensation to the minors being, as a matter of law, an entirely separate and distinct item from the present worth of the money contributions. This is contrary to justice and to common sense. A widow who has children should receive more consideration, if any difference be permitted, than those who have not.

Both the federal and state governments are directly concerned that all trials be fairly and impartially conducted. In *New York Cent. R. Co.* v. *Johnson*, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 710, this court has well said:

> "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. *Brasfield* v. *United States*, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345."

The cardinal principle of our law that judgments must be based upon the evidence before the court and that neither courts nor juries shall be permitted to disregard the evidence and determine the issues from personal opinion has, in this case, been plainly violated.

The decision below was the opposite of liberal, as liberality, in construing the statutes passed for the benefit of seamen and their families, has been construed by this court. This court has held that the statutes of limitation of liability passed for the benefit of shipowners must be construed liberally. *Deslions* v. *La Compagnie, etc.*, 210 U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973. In this case the court stated its policy, with respect to construing the statute liberally, in the following words:

> "Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations will be of the last importance; but, if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

The foregoing was said with respect to statutes passed for the benefit of the shipowners, who have always been amply able to take care of themselves; but here we have people involved who are generally considered as requiring the special protection of the courts. Does liberal construction mean only the liberal construction of the wording of the statute, or does it mean also the liberal administration of the law with respect to obtaining

proper results under the statutes enacted for the seamen's benefit? If a liberal construction of the words only is to be given, then this law also will be "hardly worth the trouble of its enactment." It is particularly necessary and appropriate that this Honorable Court require a liberal construction and application of these statutes passed in behalf of "wards of admiralty," if that fine phrase is to be translated into an accomplished fact and not permitted to remain but "as sounding brass, or a tinkling cymbal."

Though the granting of the writ in the Van Beeck case was plainly correct, the principle there in issue was of slight importance in comparison with those involved in the instant case. There the proper construction of a statute was in question, but here is involved, among other things, the all-important issue of whether this court will permit a lower court to disregard the evidence and render judgment, not upon the testimony before it, but exclusively upon its own personal opinion.

The questions involved in this case are, therefore, of paramount importance. The decision lays down a rule of law rendering illiberal that which this court says should be liberal. We realize that the time of this court should be conserved and given only to those questions that concern the welfare of the entire country. Such a situation we have here. No additional time of this court will be taken for the consideration of this entire case, since a partial writ has already been granted herein. The whole question can be argued and decided in the same time as will be required to hear the question already before this

court. The entire matter is one of law and not of fact and is of supreme importance not only to the litigants, but to the jurisprudence of the country as well. The errors of the lower court consist in disregarding the fundamental safeguards which this court, since its foundation, has been careful to uphold.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, that the writ of certiorari be issued as originally prayed for, and that the judgment of the Circuit Court of Appeals be, upon further consideration, reformed and modified in conformity with the evidence and the law.

Respectfully submitted,

M. G. ADAMS,
H. C. HUGHES,
Counsel for Petitioners.

Certificate of Counsel.

I, M. G. Adams, counsel for the above named Sophia Brennan, administratrix *et al.*, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

....,
Counsel for said Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1936.

Charles Van Beeck, Administrator, etc., Petitioner, *vs.* Sabine Towing Company, Inc., et al., Respondents.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 1, 1937]

Mr. Justice Cardozo delivered the opinion of the Court.

The Merchant Marine Act of 1920 (June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U. S. C. § 688) gives a cause of action for damages to the personal representative of a seaman who has suffered death in the course of his employment by reason of his employer's negligence. The question is whether the liability abates where the beneficiary of the cause of action, in this case the mother of the seaman, dies during the pendency of a suit in her behalf.

The steam tow-boat, Edgar F. Coney, sank on January 28, 1930, with the loss of all on board. The respondent, Sabine Towing Company, Inc., the owner of the boat, filed a libel in a United States District Court in Texas for the limitation of liability. In that proceeding claims for damages were filed by the personal representatives of several members of the crew. Among such claims was one for the pecuniary damage suffered through the death of the second mate of the vessel, Edward C. Van Beeck. He died unmarried, leaving a mother and several brothers. There being neither wife nor child nor father, the mother was the sole beneficiary of the statutory cause of action. This results from the provisions of the Employers' Liability Act (45 U. S. C. § 51), governing injuries to railway employees, which is made applicable by the Merchant Marine Act in case of injuries to seamen. Cf. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 376. The mother was appointed administratrix of her son's estate, and acting as such administratrix filed her claim for damages. She died in July, 1931, and thereupon the petitioner, a brother of the dead seaman, succeeded to her office by appointment duly made, and was substituted

as claimant in the pending suit. In that suit a Commissioner reported that the mother had suffered loss up to the time of her death in the sum of $700, and that there should be an award of that amount for the use of her estate. The District Court dismissed the claim on the ground that at her death the liability abated, and the Court of Appeals for the Fifth Circuit affirmed the dismissal. 85 F. (2d) 478. To settle the meaning of an important act of Congress, we granted certiorari.

The statutory cause of action to recover damages for death ushered in a new policy and broke with old traditions. Its meaning is likely to be misread if shreds of the discarded policy are treated as still clinging to it and narrowing its scope. The case of *Higgins* v. *Butcher,* Noy 18; Yelv. 89, which arose in the King's Bench in 1606, is the starting point of the rule, long accepted in our law, though at times with mutterings of disapproval,[1] that in an action of tort damages are not recoverable by any one for the death of a human being.[2] The rule is often viewed as a derivative of the formula "*actio personalis moritur cum persona*", a maxim which "is one of some antiquity", though "its origin is obscure and post-classical".[3] Even in classical times, however, the Roman law enforced the principle that "no action of an essentially penal character could be commenced after the death of the person responsible for the injury".[4] Vengeance, though permissible during life, was not to "reach beyond the grave".[5] There was also an accepted doctrine that no money value could be put on the life of a freeman.[6] The post-classical maxim, taken up by Coke and his successors,[7] gave a new currency to these teachings of the Digest,

[1] Tiffany, Death by Wrongful Act, §§ 3, 6-11; Pollock, Torts, 13th ed., pp. 62-65.

[2] Baker *v.* Bolton, 1 Camp. 493; Insurance Co. *v.* Brame, 95 U. S. 754, 756; Lindgren *v.* United States, 281 U. S. 38, 47; Cortes *v.* Baltimore Insular Line, 287 U. S. 367, 371; Pollock, Torts, *supra;* Tiffany, *supra.*

[3] Bowen and Fry, L. J. J., Finlay *v.* Chirney, (1888) 20 Q. B. D. 494, 502; Pollock, *supra;* Goudy, Two Ancient Brocards, in Essays in Legal History, ed. by Vinogradoff, p. 215; Radin, Anglo-American Legal History, p. 413.

[4] Fifoot, English Law and Its Background, pp. 167, 168. Cf. Buckland, A Text-Book of Roman Law, 2nd ed., p. 685; Buckland & McNair, Roman Law and Common Law, p. 288; Allen, Law in the Making, 2nd ed., pp. 196-198.

[5] Fifoot, *supra;* Goudy, *supra,* p. 218.

[6] Fifoot, *supra;* Goudy, *supra,* p. 218, citing Dig. IX, 3, 3; IX, 3, 1, § 5: "*Liberum corpus nullam recipit aestimationem.*"

[7] Pinchon's Case, 9 Rep. 86 b; Goudy, *supra,* p. 226; Allen, *supra.*

and, it seems, a new extension.[8] But the denial of a cause of action for wrongs producing death has been ascribed to other sources also. The explanation has been found at times in the common law notion that trespass as a civil wrong is drowned in a felony.[9] As to the adequacy of this explanation grave doubt has been expressed.[10] None the less, the rule as to felony merger seems to have coalesced, even if in a confused way, with the rule as to abatement,[11] and the effect of the two in combination was to fasten upon the law a doctrine which it took a series of statutes to dislodge.

The adoption of Lord Campbell's Act in 1846 (9 & 10 Vict. c. 93), giving an action to the executor for the use of wife, husband, parent or child, marks the dawn of a new era. In this country, statutes substantially the same in tenor followed in quick succession in one state after another, till today there is not a state of the union in which a remedy is lacking.[12] Congress joined in the procession, first with the Employers' Liability Act for railway employees (45 U. S. C. §§ 51, 59), next with the Merchant Marine Act of 1920 for seamen and their survivors (46 U. S. C. § 688), and again with an act of the same year (March 30, 1920, c. 111, §§ 1, 2, 41 Stat. 537; 46 U. S. C. §§ 761, 762), not limited to seamen, which states the legal consequences of death upon the high seas.

As already pointed out, the personal representative of a seaman laying claim to damages under the Merchant Marine Act is to have the benefit of "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees". 46 U. S. C. § 688. The statutes thus referred to as a standard display a double aspect. One of these is visible in the Employers' Liability Act as it stood when first enacted in 1908. Under the law as then in force (April 22, 1908, c. 149, § 1, 35 Stat. 65; 45 U. S. C. § 51) the personal representative does not step into

[8] Holdsworth, A History of English Law, Vol. 3, pp. 333, 334; Vol. 2, p. 363.

[9] Admiralty Commissioners *v.* S. S. Amerika, [1917] A. C. 38, 43, 47, 60.

[10] Holdsworth, *supra*, Vol. 3, Appendix VIII; also Vol. 3, pp. 332-336. Cf. Pollock, *supra;* Osborn *v.* Gillett, L. R. 8 Ex. 88, 96, 97; Carey *v.* Berkshire R. R. Co., 1 Cush. 475, 477, 478; Shields *v.* Yonge, 15 Ga. 349, 353; Hyatt *v.* Adams, 16 Mich. 180, 187, 188; Grosso *v.* D. L. & W. R. R. Co., 50 N. J. L. 317, 320.

[11] Higgins *v.* Butcher, *supra;* Admiralty Commissioners *v.* S. S. Amerika, *supra;* Tiffany, *supra;* Holdsworth, *supra*, Vol. 3, pp. 332-336.

[12] Tiffany, *supra*, pp. xviii to xliii; cf. 44 Harv. L. Rev. 980.

the shoes of the employee, recovering the damages that would have been his if he had lived. On the contrary, by section 1 of the statute a new cause of action is created for the benefit of survivors or dependents of designated classes, the recovery being limited to the losses sustained by them as contrasted with any losses sustained by the decedent.[13] However, with the adoption of an amendment in 1910 (April 5, 1910, c. 143, § 2, 36 Stat. 291; 45 U. S. C. § 59) a new aspect of the statute emerges into view. Section 2 as then enacted continues any cause of action belonging to the decedent, without abrogating or diminishing the then existing cause of action for the use of his survivors.[14] "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death".[15] It is loss of this last order, and no other, that is the subject of the present suit. So far as the record shows, the seaman died at once upon the sinking of the vessel. In any event there is no claim that his injuries were not immediately fatal.[16] To what extent the present problem would be altered, if intermediate loss and suffering had been made the basis of a recovery, we have no occasion to consider. Our decision must be limited to the necessities of the case before us.

Viewing the cause of action as one to compensate a mother for the pecuniary loss caused to her by the negligent killing of her son, we think the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter,[17] the damages when collected to be paid to her estate. Such is the rule in many of the state courts in which like statutes are in force.

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[13] Michigan Central R. R. Co. *v.* Vreeland, 227 U. S. 59, 68; Gulf, Colorado & Santa Fe Ry. Co. *v.* McGinnis, 228 U. S. 173, 175; North Carolina R. R. Co. *v.* Zachary, 232 U. S. 248, 256-257; Chesapeake & Ohio Ry. Co. *v.* Kelly, 241 U. S. 485, 489.

[14] St. Louis, Iron Mt. Ry. Co. *v.* Craft, 237 U. S. 648, 657; Great Northern Ry. Co. *v.* Capital Trust Co., 242 U. S. 144, 147.

[15] St. Louis, Iron Mt. Ry. Co. *v.* Craft, *supra*, p. 658.

[16] Cf. Great Northern Ry. Co. *v.* Capital Trust Co., *supra*.

[17] Cooper *v.* Shore Electric Co., 63 N. J. L. 558; Sider *v.* General Electric Co., 238 N. Y. 64.

It is the rule in New York, in Pennsylvania, in New Jersey, in Oklahoma, in Georgia, in Kentucky, in North Carolina, and under statutes somewhat different in Connecticut and Massachusetts.[18] It is also the rule in the lower Federal courts, applying the statute of Illinois as well as the Act of Congress in respect of death upon the high seas.[19] These cases take the ground that "the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created".[20] Indeed, even at common law, since statutes adopted in the reign of Edward III (4 Edw. III, c. 7; 25 Edw. III, stat. 5, c. 5), which were extended beyond their letter by an equitable construction, an administrator might recover where the wrong was an injury to property and not an injury to the person.[21] The general rule was said to be that "executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate".[22] When we remember that under the death statutes an independent cause of action is created in favor of the beneficiaries for their pecuniary damages, the conclusion is not difficult that the cause of action once accrued is not divested or extinguished by the death of one or more of the beneficiaries thereafter, but survives, like a cause of action for injury to a property right or interest, to the extent that the estate of the deceased beneficiary is proved to be impaired. To that extent, if no farther, a new property right or interest, or one analogous thereto, has been brought into being through legislative action. True, there are decisions under the

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[18] Matter of Meekin *v.* B. H. R. R. Co., 164 N. Y. 145; Sider *v.* General Electric Co., *supra;* Fitzgerald *v.* Edison Electric Illuminating Co., 207 Pa. St. 118, 122; Cooper *v.* Shore Electric Co., *supra;* City of Shawnee *v.* Cheek, 41 Okl. 227, 252; Frazier *v.* Georgia R. R. & Banking Co., 101 Ga. 77, 78 (semble); Kentucky Utilities Co. *v.* McCarty's Admr., 169 Ky. 38, 46; Neill *v.* Wilson, 146 N. C. 242; Waldo *v.* Goodsell, 33 Conn. 432; Johnston *v.* Bay State St. Ry. Co., 222 Mass. 583, 584; De Marco *v.* Pease, 253 Mass. 499, 508.

[19] Union Steamboat Co. *v.* Chaffin's Admrs., 204 Fed. 412, 417; The City of Rome, 48 F. (2d) 333, 341, 342.

[20] Matter of Meekin *v.* B. H. R. R. Co., *supra*, p. 153.

[21] Williams, Executors and Administrators, 7th Am. ed., Vol. 2, p. 4, 5; Chamberlain *v.* Williamson, 2 M. & S. 408, 412; Leggott *v.* Great Northern Ry. Co., (1876) 1 Q. B. D. 599, 606; Pulling *v.* Great Eastern Ry. Co., (1882) 9 Q. B. D. 110.

[22] Chamberlain *v.* Williamson, *supra*, p. 415; Whitford *v.* The Panama R. R. Co., 23 N. Y. 465, 476.

death statutes of some states that teach a different doctrine, refusing to permit a recovery by the administrator after the beneficiary has died,[23] though the ruling has been made at times with scant discussion of the problem. Indeed, the problem now before us was not always presented to the attention of the court, for at times the death of the beneficiary followed hard upon the death of the person negligently killed or the claim was not urged that there had been damage in the interval. We think the cases favoring survival within the limits already indicated are supported by preponderant authority and also by the better reason.

Nothing at war with that conclusion will be found in our opinion in *Chicago, Burlington & Quincy Railroad Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, on which the court below leant heavily in deciding as it did. The suit was under the Employers' Liability Act which gives a cause of action (a) to the widow or children; (b) to the parents if no widow or children survive; or (c) to dependent next of kin, if there be no surviving widow, child or parent. A mother survived the employee, but died before an administrator was appointed. The holding was that the beneficial interest did not shift upon her death to members of class (c). "The failure to bring the action in the mother's lifetime did not result in creating a new cause of action after her death for the benefit of the sister". 275 U. S. at p. 164.[24] The question was not raised whether the damages, if any, suffered by the mother between the son's death and her own would have been recoverable, if proved. Nor is the case at hand affected by statutes, invoked by the respondent, which regulate the continuance of a proceeding in a court of the United States by the substitution of the executor or

[23] Schmidt *v.* Menasha Woodenware Co., 99 Wis. 300; Gilkeson *v.* Missouri Pac. Ry. Co., 222 Mo. 173; Railroad *v.* Bean, 94 Tenn. 388; Harvey *v.* Baltimore & Ohio R. R. Co., 70 Md. 319; Doyle *v.* Railroad Co., 81 Ohio St. 184; Huberwald *v.* Orleans R. Co., 50 La. Ann. 477; Taylor *v.* Western Pac. R. R. Co., 45 Cal. 323; Wabash R. R. Co. *v.* Gretzinger, 182 Ind. 155 (semble). Cf. Sanders' Admx. *v.* Louisville & N. R. Co., 111 Fed. 708, 709; McHugh *v.* Grand Trunk Ry. Co., [1901] 2 Ont. L. Rep. 600.

At times state decisions have drawn a distinction between the death of a beneficiary before and during suit. See, e. g., Frazier *v.* Georgia R. R. & Banking Co., *supra*. The validity of that distinction is irrelevant to the case at hand. Cf. however, Chicago, Burlington & Quincy R. R. Co. *v.* Wells-Dickey Trust Co., 275 U. S. 161, 163; Reading Co. *v.* Koons, 271 U. S. 58.

[24] Cf. Wilcox *v.* Bierd, 330 Ill. 571; Rogers *v.* Fort Worth & D. C. Ry. Co., 91 S. W. (2d) 458 (Tex. Civ. App.).

administrator of a party dying while the suit is pending. 28 U. S. § 778. The present claimant is not the administrator of the deceased beneficiary, but an administrator *de bonis non*, who has succeeded to the office of the original administrator.[25] The order substituting him as a party was made without objection, and he continued in the suit thereafter as if he had filed a claim anew.

Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied.[26] There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed".[27] Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day.[28]

The decree should be reversed and the cause remanded for further proceedings in accord with this opinion.

Ordered accordingly.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[25] Cf. Thompson *v.* United States, 103 U. S. 480, 483.

[26] Cf. The Arizona *v.* Anelich, 298 U. S. 110, 123; Beadle *v.* Spencer, 298 U. S. 124, 128.

[27] Per Holmes, Circuit Justice, in Johnson *v.* United States, 163 Fed. 30, 32. Cf. Gooch *v.* Oregon Short Line R. R. Co., 258 U. S. 22, 24; S. & C. A. Commercial Co. *v.* Panama R. R. Co., 237 N. Y. 287, 291.

[28] The Arizona *v.* Anelich, *supra;* Cortes *v.* Baltimore Insular Line, *supra;* Warner *v.* Goltra, 293 U. S. 155.